

Middlesex University Research Repository

An open access repository of

Middlesex University research

<http://eprints.mdx.ac.uk>

Schatzberger, Elliot ORCID logo ORCID: <https://orcid.org/0000-0001-8112-8484> (2018) Legal educator as translator: a critical reflection. [Doctorate by Public Works]

Final accepted version (with author's formatting)

This version is available at: <https://eprints.mdx.ac.uk/24341/>

Copyright:

Middlesex University Research Repository makes the University's research available electronically.

Copyright and moral rights to this work are retained by the author and/or other copyright owners unless otherwise stated. The work is supplied on the understanding that any use for commercial gain is strictly forbidden. A copy may be downloaded for personal, non-commercial, research or study without prior permission and without charge.

Works, including theses and research projects, may not be reproduced in any format or medium, or extensive quotations taken from them, or their content changed in any way, without first obtaining permission in writing from the copyright holder(s). They may not be sold or exploited commercially in any format or medium without the prior written permission of the copyright holder(s).

Full bibliographic details must be given when referring to, or quoting from full items including the author's name, the title of the work, publication details where relevant (place, publisher, date), pagination, and for theses or dissertations the awarding institution, the degree type awarded, and the date of the award.

If you believe that any material held in the repository infringes copyright law, please contact the Repository Team at Middlesex University via the following email address:

eprints@mdx.ac.uk

The item will be removed from the repository while any claim is being investigated.

See also repository copyright: re-use policy: <http://eprints.mdx.ac.uk/policies.html#copy>

‘Legal Educator as Translator: a critical reflection’

Submitted to Middlesex University in partial fulfilment of the requirements for the degree of Doctor of Professional Studies by Public Works

Elliot J. Schatzberger BA(Hons), PGDipLaw, Barrister-at-Law

Date of submission: May 2018

Disclaimer: The views expressed in this research project are those of the author and do not necessarily reflect the views of the supervisory team, Middlesex University, or the examiners of this work

Elliot Schatzberger May 2018

Middlesex University

Acknowledgements and thanks

Firstly, I would like to express my heartfelt thanks to my supervisor Dr Kate Maguire for her insight, encouragement and guidance. Kate not only enabled me to 'see the light' in relation to critical reflection but also helped me to create a work which seeks to show that it is possible to transform the horrific into a creative, dynamic action that is a tangible demonstration that the darkness of 20th Century Fascism did not win.

I would also like to thank my Head of Department and doctoral consultant Professor Laurent Pech for his tireless support and allowing me the time to make this project happen; to my colleague, mentor and friend Dr Lilian Miles for helping me see through the lens and to my colleague and friend Susan Scott-Hunt for sowing the seed which was the genesis of this work.

I would also like to thank my amazing wife Ewa and our incredible Emilia for their love, support and patience. Our warm and loving home-life has contributed to this work more than either will ever know.

Finally, this work is dedicated to my family, especially my late mother, father and grandparents. It struck me that my final draft was completed on the very day of what would have been my mother's 80th birthday. Without my lineage and their history, this work would never have been written. Also, of course my brother Simon and sister Julie. It is a tribute to their resilience and to their survival, and a tribute to all who are able to do more than just survive. The magnitude of the human spirit cannot and should not ever be underestimated.

TABLE OF CONTENTS

ACKNOWLEDGMENTS AND THANKS	3
LIST OF PUBLIC WORKS	5
SUMMARY OF MY INTENTIONS	6-7
METHODOLOGY AND THE THEORETICAL LENS	8
CRITICAL THEORY	8-11
SOCIAL CONSTRUCTIVIST THEORY	11-15
CURRENT PEDAGOGY IN HIGHER EDUCATION; A CONTEXTUALISATION.	15-25
 PART 1: CRITICAL REFLECTION	 26
THE SEARCH FOR MEANING	26-29
OUT OF AUSTRIA	30-34
DUTCH COURAGE AND THE BLITZ SPIRIT	35-37
THE FAMILY SCHATZBERGER	38-41
THE ROAD NOT TAKEN	42-45
FROM WIG TO WIG	46-49
 PART 2: PUBLIC WORKS	 50
LIST OF PUBLIC WORKS	51
PUBLIC WORKS THEMES	52-55
1. A REPORT ON THE 'ABUSE OF POWER, PROCESS AND LAW; MALAWI'	56-71
2. 'TEACHING LAW – AN INNOVATIVE APPROACH'	72-83
3. TEXT BOOK 'LAND LAW – YOUR BLUEPRINT TO LEARNING'	84-87
4. 'THE IMMIGRATION ACT 2014' JOURNAL ARTICLE	88-90
5. KAZAKHSTAN JUDICIAL TRAINING	91-93
FINAL THOUGHTS	94-95
BIBLIOGRAPHY	96-107
 APPENDICES:	
APPENDIX I: MALAWI REPORT	108-119
APPENDIX II: LAND LAW TEXTBOOK; INTRODUCTORY CHAPTER	120-127
APPENDIX III: LAND LAW TEXTBOOK; SKILLS CHAPTER	128-136
APPENDIX IV: LAND LAW TEXTBOOK; LAND LAW CHAPTER 1	137-159
APPENDIX V: IMMIGRATION ACT 2014 JOURNAL ARTICLE	160-181

List of Public Works

1. *Report on the 'Abuse of power, process and law; Malawi'; created and developed under the auspices of and published by the Criminal Bar Association [UK] (2004)*
2. *'Teaching Law – an innovative approach'; Text Book 'Business Law' - Pearson Publications (2011)*
3. *Text book 'Land Law – your Blueprint to learning' – Pearson Publications (2014)*
4. *'The Immigration Act 2014; 'Not on the list you're not coming in; Landlords forced to discriminate' – published in the Conveyancer and Property Lawyer (2015)*
5. *Consultation Paper 'The Role of Equity in English Law'; written for the Kazakhstan Supreme Court [work-in-progress]*

Summary of my intentions

I start with my name as, through this doctoral commentary, I have come to re-contextualise my name and its association with my identity in my current role and its importance in influencing how I teach. It is Elliot Schatzberger. My surname translates as 'man from Treasure Mountain', but another translation, taken from Germanic Yiddish, which has even more resonance, is the 'good or treasured shepherd'

I am a Senior Lecturer in Law and recently appointed Head of Learning and Teaching within the School of Law and Politics at Middlesex University. I have been given the opportunity to write this work to facilitate an exploration of what Bruns (1995) refers to as the nature of the hermeneutical experience in relation to my role as a legal educator. This doctorate is an opportunity to articulate what feeds into my own pedagogy and philosophy of education and what is transferable to others.

Interrogating my works through the methodology and theoretical lenses of both Vygotsky's Social Constructivist theories (Cole et al, 1979) and Critical Theory as propounded by Horkheimer, Adorno and others (Cowan, 2003), I will hope to address what is taught or can be taught and what comes from within, through personal experience. The objective, in line with the Schon's 'critical consciousness' theories (1983), is to reflect on my formative years, my early career and my Public Works from 2003 in Malawi to 2016 in relation to my journal article, in order to demonstrate that, as illustrated by Bruns' hermeneutic devices, the personal cannot and should not be divorced from the social, professional, universal and political (Bruns, 1995).

I aim to demonstrate that it is exactly this manner of critical reflection that can bridge the personal and professional to illuminate my teaching and my role as a legal educator. What I hope will emerge is not only how to learn from reflection, but how to develop the curriculum and the pedagogy, the difference between being an inspiring and successful legal educator and taking responsibility for the development of teaching. I also aim to demonstrate that as McKinley (2015, p.184) suggests, "human [pedagogical] development is socially situated, and knowledge is constructed by interaction with others."

The critical commentary is in two parts; firstly, a critical self-reflection looking back at what Philip Roth in his discussion with Primo Levi refers to as "...rootedness..." (1986, p.182) - an examination of my family history and early career path and how that has deeply influenced the values I hold, and which inform my professional practice and public works and, secondly, a critical analysis of the Public Works themselves. What has emerged that interconnects them: values and ethics; a strong drive towards acceptance of difference; making something out of what at first appears to be very little and helping people not just to survive but to reveal and develop their potential.

Methodology and the Theoretical Lens

An approach to critiquing the public works

I have chosen to interrogate my works through two separate theoretical lenses, both of which are apposite to my two main classifications of Public Works. In relation to my practitioner works in Malawi which has informed the formation of a new public work with the Supreme Court Justices in Kazakhstan, I have found critical theory to have some appeal, specifically the Frankfurt School and the work of Horkheimer and Adorno. In relation to my pedagogical works, I have rediscovered Lev Vygotsky and his particular take on social constructivism. Both theoretical frameworks lend themselves to the underpinning and reflective analysis of my Works. This doctoral commentary has allowed me the opportunity for what Schon refers to as "...reflection-in-action" (1983, p.278) and it is through the process of writing by way of critical reflection that I have selected these frameworks to explore my "...philosophy of [the] educative experience" (Dewey, 1938, p.28). Highly relevant to both my practice as a lawyer, and my pedagogy as an educator, I hope to demonstrate that as Freire put it "...reflection...is essential to action" (1970, p.27), and that this critical thinking will in itself allow for a "...continuing transformation of reality [on] behalf of the continuing humanization of men" (Freire, 1970, p.65) resulting in "education as the practice of freedom" (1970, p.66).

Critical Theory: The Frankfurt School

According to Held (1980) a recognised historian of this era the Frankfurt School essentially arose out of Karl Marx's seminal Communist Manifesto by setting down what he and fellow author Engels believed was at the root of the perennial class struggle and therefore of social and political injustice; that society perpetually establishes "... new classes, new conditions of oppression, new forms of struggle in place of the old ones." (Marx and Engels, 1888, p.2). After a period of ideological differences within the Communist party the *Institut fur Sozialforschung* - the Institute of Social Research – in Frankfurt, Germany emerged in 1923 with Marxism as the

“inspirational and theoretical basis” (Held, 1980, p.29). Under the leadership of Max Horkheimer in 1930, it began to shift dramatically away from occupations with Marxism to a call for a “...dialectical penetration and development of philosophical theory and the praxis of individual scientific disciplines” (p.32). By gathering around him a talented group of diverse thinkers and writers such as Adorno, Fromm, Marcuse, and Neumann, the Frankfurt School and critical theory began to draw world-wide attention.

In relation to my own positioning, the genesis of the Frankfurt school has particular resonance, given that it was operating under the spectre of what would soon, in 1933, be the new Fascist regime in Nazi-Germany. Indeed, as Jewish academics, Horkheimer and his associates after only three years were forced to leave Germany, but as Held points out, after relocating first to Geneva in 1933 and then to Columbia University in New York in 1935 the Institute enjoyed its most active years between 1930 and 1944. This of course is of little surprise as their work, coinciding as it did with the rise of Nazism and Fascism, was intended to “...become a material force in the struggle against domination in all its forms” (Held, 1980, p.35).

Against this backdrop Horkheimer and Adorno's seminal work ‘Dialectic of Enlightenment’ was written and published in 1944 as an attempt to re-examine critical theory considering the domination of Nazism and Stalinism. Key questions which needed such critical analysis included why and how Nazism and Fascism had escalated to such a point that it dominated most of Europe with what Horkheimer and Adorno saw as large-scale support. They stated:

“What we had set out to do...was nothing less than to explain why humanity, instead of entering a truly human state, is sinking into a new kind of barbarism.” (Horkheimer and Adorno, 1944, xiv).

In a later preface to the 1969 edition of their work, the authors enunciate the purpose of critical theory; “Critical thought, which does not call a halt before progress itself, requires us to take up the cause of the remnants of freedom, of tendencies toward real humanity, even though they seem powerless in face of the great historical trend” (Preface to the New Edition, xi). In another paragraph which resonates personally given my own heritage and lineage, the authors introduce their discussion on “Elements of Anti-Semitism” describing Hitler’s rise to power as “...the reversion of enlightened civilization to barbarism in reality” (Preface (1944-1977) xix). Without

critical thought, Horkheimer and Adorno warn that that each human being loses their “self of his or her own” and this results in the “...unity of the manipulated collective...[negating] each individual and in the scorn poured on the type of society which could make people into individuals” (Horkheimer and Adorno, 1944, p.9).

In his early essay, credited with the initial exposition of critical theory, Horkheimer explains that “Critical thinking is the function neither of the isolated individual nor of a sum-total of individuals” (Horkheimer, 1937, p.210), rather it relates to “...a definite individual in his real relation to other individuals and groups, in his conflict with a particular class, and, finally, in the resultant web of relationships with the social totality and with nature” (Horkheimer, 1937, p.210-211). As the author later suggests “Critical theory does not have one doctrinal substance today, another tomorrow” (p.234) but is stable enough to allow for a constant and as such the theory allows an analysis of socio-political-legal and economic issues as the need arises and specific theoretical content must be constantly and “radically questioned...the thinker must be constantly beginning anew” (p.234).

Critical theory has a reach, therefore, that is wider than the context in which it arose. In exploring my own works, I have come to understand that critical theory is an appropriate lens through which to view my works as I can put critical theory into practice in each ‘specific theoretical content’ firstly radically questioning the status quo, then trying to discover key actors with the agency to effect change and finally to draw conclusions as to what changes may be possible and exactly how these changes might occur. As Horkheimer states in his Preface added in 1968, Critical Theory can be applied as much to Marx’s revolutionary Russia, Hitler’s Nazi Germany, Stalinist Russia, Mao’s China or as at the time he was writing the Preface, “the United States fateful invasion of Asia” (Preface 1968, p.vi). If Horkheimer was writing today, he would have no difficulty in applying it to Donald Trump’s USA or the ‘Brexit’ shockwave here in the United Kingdom or the rise and fall of a range of dictators with a lust for killing their own people. He held the view that the world is complex, and actions are decided by many factors. Problems need to be considered from different angles. He gave a warning that is as relevant in 2018 as it was in 1968, that “Only those who are subjective, one-sided and superficial in their approach to problems will smugly issue orders or directives the moment they arrive on the scene, without considering the circumstances, without viewing things in their entirety (their history and their present

state as a whole) and without getting to the essence of things (their nature and the internal relations between one thing and another).” (at page vii).

To me, this encapsulates what critical theory and critical thinking is about, and perhaps without previously realising it, is how I have tried to position myself personally and professionally in my life and career as reflectively illustrated by my works. One particular passage in Horkheimer’s Preface perhaps summarises one of my main objectives in creating my works. Reflecting my own ideology as a legal educator, Horkheimer explains that “Not a few of the impulses which motivate me are related to those of present-day youth - desire for a better life and the right kind of society, unwillingness to adapt to the present order of things.” (page viii). However, given my heritage and personal background with my grandfather murdered at the hands of the Nazi regime, I discovered one more sentence which particularly resonates and could be said to be one of my personal motivations in writing this statement; “...to give voice to what one knows and thereby perhaps to avert new terror remain the right of a man who is still really alive” (at page viii).

This leads me to my second theoretical lens, more specifically relevant to my pedagogical approach, that of Vygotsky’s Social Constructivism Theory as I believe one way of averting terror based on individualism and prejudice is through a ‘good’ education that goes beyond the transmission of cultural expectations.

Social Constructivism Theory

One of the main objectives in undertaking this doctoral commentary was to address certain elements of my past career practice. Schon proposes that “...competent practitioners usually know more than they can say” (1983, p.8) and to a certain extent, in my early career I now see myself as a ‘butterfly’ constantly fluttering from one role to the next, without ever stopping for breath and analysing any meaningful, “...verifiable insight into [my] thought processes” (Schon, 1983, p.49) This commentary is an opportunity to analyse my pedagogical method more rigorously.

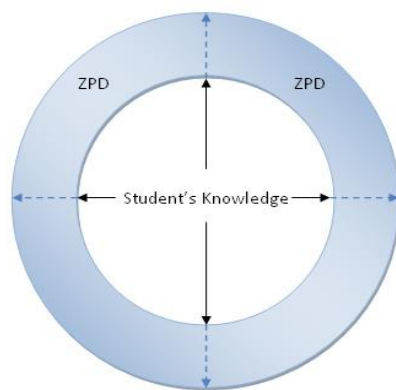
As Dewey points out continuity of experience can be “...framed with reference to what is done and how it is to be done” (Dewey, 1938, p.28) but a “...philosophy of education,

like any theory, has to be stated in words..." (1938, p.28). At the genesis of my venture to write this commentary, I needed to find a theoretical lens to interrogate my specific pedagogic method, as I was only too aware that it would be of little value to argue that my teaching comes from within, based only on my own heritage and lineage. It is accurate to state as Eastman and Maguire (2016) suggest, that my critical autobiography plays a major role in illustrating the values which inform me both personally and professionally, but if I claim that my style and method is based on what comes from within, then this has no tangible transferability and ostensibly lacks academic foundation. As such, I return to one pedagogical theory, which seems to reflect my own educative philosophy, that being the social constructivist theory credited to Lev Vygotsky.

McKinley credits Vygotsky with the creation of a specific learning theory known as social constructivism, based on socially situated human development where knowledge is constructed through human interaction (McKinley, 2015, p.1). Cole and Scribner (1978) point out that Vygotsky "...was the first modern psychologist to suggest the mechanisms by which culture becomes a part of each person's nature..." (p.6) highlighting that he "...lectured and wrote extensively on problems of education, often using the term "pedology," which roughly translates as "educational psychology." (p.10). Though the work of Vygotsky is primarily based around the studies of what would now be referred to as 'early-years learning', that is the learning processes of very young children, his social constructivist theory translates easily, and arguably more tangibly, to the older student especially those in higher education. Unlike Piaget, Vygotsky's theory is based on the notion that learning is built upon a foundation of pre-existing social development rather than vice versa and that "Every function in the child's cultural development appears twice: first, on the social level and, later on, on the individual level; first, between people (interpsychological) and then inside the child (intrapsychological)" (1978, p.57) arguing that learning builds on experience and knowledge already gained from inter-personal and social interaction. This gives support to my own view based on experience of teaching in higher education for several years that Vygotskian theory is even more relevant to the older learner. In Part Two of his work, entitled 'Educational Implications' Vygotsky elucidates his 'new approach', the "Zone of Proximal Development" (p.84). He explains that "The zone of proximal development defines those functions that have not yet matured but are in the

process of maturation, functions that will mature tomorrow but are currently in an embryonic state. These functions could be termed the "buds" or "flowers" of development rather than the "fruits" of development." (p.86). When the student enters higher education they are not matured, they are in a constant state of maturing as they encounter more concepts, more ideas, more possibilities. It is one of the purposes of higher education to provide, as Gibbs (2017) points out, the conditions for flourishing or indeed flowering.

Figure 1 : The Zone of Proximal Development (Jennings, 2017)



White circle: what the student can learn unaided
Blue circle: what student can learn with help
ZDP: area of 'potential' where learning takes place

According to Jennings (2017) Vygotsky believed that learning takes place within the *Zone of Proximal Development*. Crucially it is within this zone that students can, with the help of what Vygotsky referred to as the More Knowledgeable Other, master complex concepts which unaided they would be unable to understand on their own. As such, Vygotsky argued that children [or older students] arrive in formal education at a point of pre-existing learning, and therefore there are a number of problems which may be solved independently. This has particular resonance as the students I encounter and teach arrive in higher education with fairly basic skills developed through childhood and early education, including social skills and fundamental reading and writing skills. In Jennings' diagram, this is the white area at the centre. Vygotsky then explains that the Zone of Proximal Development is the outer area [in blue] which is the point the learner is capable of reaching under the guidance of teachers or in collaboration with peers, the More Knowledgeable Other. As Jennings (2017)

suggests, in social constructivist classrooms "...collaborative learning is a process of peer interaction that is mediated and structured by the teacher..." where students are guided rather than simply 'lectured at'. (2017, p.1). It is exactly this collaborative learning environment which as McKinley (2015, p.3) points out, is conducive to a positive learning outcome allowing higher education students to engage in critical thinking. Vygotsky also makes another valid assertion based on the difference between imitation and true learning. It is too often accepted that students can simply learn 'parrot-fashion' reproducing by rote the words spoken by the 'sage on the stage'. Vygotsky suggests that like a complex mathematical equation, if the problem lies outside the student's developmental level, no amount of imitation will result in the student understanding the solution: "a person can imitate only that which is within her developmental level" (Vygotsky 1978, p.88).

Undertaking this critique of my own works has refreshed my thinking and approach to teaching and challenged my lack of proximal development in this area for myself while constantly developing it for my students and in my concurrent legal consultancy. I have rediscovered that Vygotskian theory is central to my pedagogical method and style and therefore stands as the bedrock of my teaching. I make a conscious effort each and every academic year to understand my new cohort, to identify their 'white circle' before I embark on my lectures. I see my lectures more as interactive workshops, or dialogic encounters with the law and what it means in everyday life, especially from my students' perspective. I strive to then build on their pre-existing skill-base to take them into the Zone of Proximal Development through collaboration and guidance rather than taking a traditional transmissionist approach. As Freire suggests, if we as educators choose the latter approach, our students' education can "suffer from narration sickness" where we simply "fill the students with...contents detached from reality" meaning that words can be "...emptied of their concreteness and become a hollow, alienated and alienating verbosity" (Freire, 1970, p.44). Freire argues that mechanical memorisation without true understanding turns the students into "containers, into receptacles to be filled by the teacher" and through this lack of "creativity, transformation and knowledge" this "misguided system" with its lack of inquiry and lack of praxis, the individual students "...cannot truly be human". Freire's powerfully phrased assertion is that this can lead to the students being "...alienated like the slave in the Hegelian dialectic...[accepting] their own ignorance as justifying

the teacher's existence" but without ever realising that they can educate the teacher (p.45). Freire, on a more positive note, suggests that following a more Vygotskian path can result in a "...humanist, revolutionary educator..." who along with the students can "...engage in critical thinking and the quest for mutual humanization" (p.48). It is through this theoretical lens that my early practice and my pedagogy will be interrogated.

Current Pedagogy in Higher Education; a contextualisation.

There is an old adage which states that good teachers are born, not made (Moore, 2004), but what I am suggesting is that educators can develop their style and use experiential learning to great effect, especially if they engage in the process of critical reflection throughout their teaching career. Following the Experiential Learning Model, Kolb suggests that "Knowledge results from the combination of grasping and transforming experience" (Kolb 1984, p.41). Kolb suggests that experiential theory combines Dewey's philosophical pragmatism, Lewin's social psychology, and Piaget's cognitive-developmental genetic epistemology to form a unique perspective on learning and development. (Kolb, 1984). According to Kolb *et al* (1999, p.28) Experiential Learning Theory "...helps us to understand learning and flexibility at a deeper and yet more comprehensive level than previously..." whilst providing for "...better processes in education". As Mobbs (2018) points out, Kolb's theory supports the view that a person learns through discovery and experience, and from a pedagogic perspective, it is our own experiences which position our ability to facilitate the learning process. If, therefore, we as legal educators immerse ourselves in the experiential learning process, reflecting on our own experiences both as practitioners or as legal academics, we can then cascade this to our own learners, the students. They too can then learn 'experientially'. Turner *et al* (2016) argue that the teaching of substantive law must be complemented and enhanced by allowing students to experience practical legal skills such as mooting and debating, as this not only enriches their learning experience but also instils in them a passion for studying law. This echoes Dewey's early work advocating that students should be participators in their own learning rather than just spectators (Dewey, 1916). Tokarz *et al* (2014,

p.14), whilst acknowledging the value of simulated exercises, call for "...expanded practice-based experiential education..." which they argue "...will provide foundational learning for the successful transition from law student to law practice". As Wallace (2017, p.1) argues, "Pedagogical innovation has become a necessary part of higher education in general, and legal education in particular". Wallace cites Dewey, Kolb and Vygotsky in her explanation of both constructivist and experiential theories of learning. She explains that a constructivist view of learning demonstrates a clear ontological shift from the traditional behaviourist approach. However, Wallace also suggests that "...constructivists and behaviourists both share a basic epistemological notion of how learning happens: learning is the individual acquisition or development of something, whether a body of knowledge, a set of concepts, or a skill." (Wallace, 2017, p.3). Wallace argues that as educators, there is pedagogic value in following the constructivist approach, putting into practice "Dewey's emphasis on the importance of a democratic attitude towards the educational process, and Vygotsky's embedding of learning processes into language and discourse" (2017, p.5).

The transmissionist approach, as explained by Markless (2004) leads the educator to adopt a more behaviourist approach, where the teacher imparts their own skills to the students in a structured, linear way. Exactly as we tend to do now, Markless suggests that teaching is either a lecture with limited discussion or workshops where students are required to work through a quiz or follow a list of instructions in order to learn how to find information. In law teaching, it is often expected that the students learn 'like parrots' This transmissionist approach, which favours the famous and arguably still-dominant Langdell 'case method' of teaching law, seems to run counter to the constructivist approach failing as it does, according to Schon, to allow students to master analytic technique and conceptual material. (Schon, 1983, p.29). As Freire (1970) suggests, if a dialogic approach is taken, then the "...teacher-of-the-students and the students-of-the-teacher cease to exist..." allowing for a "...process in which all grow" (Freire, 1970, p.53). Law is often perceived as a learning by rote profession for those with good memories. However, law pervades every aspect of life; its professional practice includes research, challenge, debate, reasoned argument and associative thinking processes, that is, for example in the role of barrister, the skills

to interconnect what at first look like disparate pieces and make sense of them to jurors, skills which are learned and honed through accumulated and reflected-on experiences.

Critical reflection

However, the start-point as advocated by this doctoral commentary, is self-reflection. Schon's warning is that without self-reflection, practitioners become "...locked into a view of themselves as technical experts" (Schon, 1983, p.69). Schon suggests that practitioners must "...develop an epistemology of practice which places technical problem solving within a broader context of reflective inquiry." (p.69).

Such reflection can also develop a sense of criticality about theory which informs teaching practice in the case of the teaching of law, that would be what James *et al* (2010) refer to as the operational conceptualisation of critical legal thinking. Burbules and Beck (1999) describe the critical legal thinker as one who possesses certain character traits. They are self-confident and independent, willing and able to challenge orthodoxy and ignorance and think for themselves even if they disagree with the majority of their peers or common sense. What they do not include is the role of critical reflection in developing self-confidence and independent thinking. Edwards and Hill (2016, p.18) in their own professional doctoral work argue that engagement with students is enhanced by a process of "...critical engagement...critical thinking and critical reflection". They draw from Beyer (1985, p.270-276) who argues that "...a critical thinker approaches information, assertions and experience with a healthy scepticism about what is *really* true or accurate or real as well as with a desire to search through all kinds of evidence to find that 'truth'". Edwards and Hill pose a set of questions which I believe to be highly pertinent and the most critical an educator should ask of themselves in their desire to enhance the pedagogic process: "What is wrong with the higher education 'society'...Who are the agents who can change it...[and] how can the "current unsustainable status quo..." be challenged and transformed" (Edwards and Hill, 2016, p.20). One way, they suggest is by collaboration, working alongside partners and other stakeholders both inside Middlesex University and outside. The authors draw on the work of Gray (1989, p.5) who describes collaboration as a process "...through which parties who see different

aspects of a problem can constructively explore their differences and search for solutions that go beyond their own limited vision of what is possible.” As Moon (2000, p.19) argues, critical reflection can “...work towards the identification of the best solution”, and collaboration is one such solution to enhance student learning.

Collaboration

Contextualising my own teaching practice, I have also used this approach to go beyond my own vision. Through collaboration with what is now the Learning Enhancement Unit, I worked closely with Dr Nick Endacott, the head of the LEU team, to find ways to engage the year one students in workshops during their first year on the LLB law degree. Endacott shared with the students some of the most effective ways to memorise legal cases, and while he focussed on the memorising techniques, I added the legal context such as facts and ratios of the various cases we identified as being core to the topic. We positioned ourselves as Vygotsky’s ‘more knowledgeable other’ and as such were able to move the students into their ‘zone of proximal development’ (Vygotsky, 1978) by helping the students to develop methods of memorisation which they had perhaps not employed since earlier childhood learning. We made quite the ‘double act’ and the students fed back that they felt inspired, engaged, informed and confident. My approach is to embrace such interactive engagement techniques and, as Offer *et al* (2017) suggest, learning can be enhanced by enjoyment and enjoyment is enhanced by dialogic and other forms of interaction. The ‘sage on the stage’ (King, 1993) does not speak to young students today who live in a highly interactive world. I have been challenged many times as to my use of humour in the lecture theatre and the classroom. Used deliberately and judiciously, I have always argued that along with storytelling [which I will deal with in due course] it is a powerful weapon in my pedagogic armoury. Offer, Skead and Keen (2017) support my ‘controversial’ assertion. They begin by suggesting that not much has been written on the benefits of such an approach in a law classroom, but point to evidence which suggests that the “...use of appropriate, relevant and inclusive humour can help create a friendly, unthreatening learning environment, which can in turn increase student engagement and participation” and, supporting another of my

theories, draw on the work of Ziv (1988) who illustrates that humour can have a significant and positive impact on students' retention of material (Offer et al, 2017, p.1). They point out that of course, they are not advocating "...sarcasm and other forms of negative humour, such as sexually or ethnically depreciatory humour" (p.1) but they do advocate what they refer to as 'positive humour' which can elicit a positive response. They point to studies carried out by Kelley and Gorham (1988, p.198) which illustrate that "...humour captures and maintains students' attention" which has the effect of improving cognitive learning.

The question which has been asked of me often is how I achieve that enjoyment in the classroom. Through this doctoral process, I think that I can answer that better than I could have done before undertaking this doctoral pathway. Interactive teaching can be uncomfortable for some teachers especially for those who believe there is a kind of sacredness to legal texts. They can find their own way to be interactive or engaging if their teaching is congruent with who they are, and who they are and what influences their style can be articulated through this process of critical reflection. My own critical autobiographic approach has helped me to identify those influences and has made me aware of the value of different styles and the importance of developing congruence in ourselves as teachers and in our students to reveal and maximise the potential of who they are. I intend to explore more fully this fundamental notion which was brought into psychotherapy discourses through Carl Rogers (1959). I have only fully experienced it myself by being able to step back in this process and think. I now know why I teach the way I teach. Interactive techniques are useful, but how and if they are used need to be congruent with the teacher. I have come to understand *why* I tell stories of classic case law such as the two whisky-filled pilots! [I tell this story later in this commentary].

Returning to the theme of collaboration, in my new role as Head of Learning and Teaching I have already begun the process with several colleagues. The Dean of the Law School Professor Joshua Castellino and I have discussed a shared vision whereby our law students are not just trained to memorise and recite case after case, the more traditional LLB approach for many years, based on the Harvard-Langdell late 19th Century 'case-method' technique. We agree that our law students must be able to grasp the key concepts of political, social and criminological discourse, to

become a critical legal thinker not just a lawyer. As one of my own law teachers from my time on the BVC at Inns of Court School of Law suggests, we must ask ourselves the question as to whether legal training is “...actually aiming for the best outcomes for its students—if we have taught law students to think differently, maybe we should also take the chance to remind them of how everyone else is thinking—open their eyes to the real world” (McPeake, 2007, p.307).

As a school we are ‘split’ across Law, Sociology, Criminology and Politics, but one part of my remit in my new role, which on reflection, is inextricably linked to my own narrative and positioning, is to try to achieve a cross-fertilisation of all these disciplines. This is where the theories of Transdisciplinarity come into play as illustrated later in this work. Hadorn *et al* (2011) suggest that this approach does not require a “universal genius” to provide university education, but rather a practitioner willing to work in a heterogeneous team and be willing and able to relate their own perspective on a subject with other perspectives of relevance to facilitate true understanding. One of my projects for the new academic year is to invite lecturers from each discipline to give an introductory lecture in their colleague’s modules. I intend, and vice versa, to have criminologists explain or even story their discipline in year 2 criminal law lectures and for politics lecturers to ‘talk politics’ in year 1 Public law lectures so the students will get to grips with the political arena before they attempt to understand the nuances of bringing a claim for Judicial Review for example. In this way, we hope to make ‘more rounded’ law students.

This is all the more important now given the forthcoming changes to the LLB law degree which is set to change beyond recognition in the coming years. Moorhead (2016, p.1) points out that “...the provision of legal education at university level, namely the LLB...” is about to change “...and adapt in order to attract the best students and promote the legal profession while also meeting market demands”. He explains the new Solicitors Regulation Authority [SRA] proposals on “...how best to assess the competence of intending solicitors” (Solicitors Regulation Authority, 2015, p.1) which “...will, in theory, allow total freedom over the content of the law degree. The current Qualifying Law Degree (QLD) requires a significant degree of rigidity, and

one response to that rigidity is to get all the core courses out of the way straight away. "Once the QLD goes... there is room for fresh thinking..." (Moorhead, 2016, p2)

From a personal standpoint, I intend to start working with colleagues on ways to 'revamp' and reform our product [the LLB in particular] so that we are at the forefront of legal education at Middlesex University providing ground-breaking and practical legal training for the 21st century. As I have advocated throughout this work, 'fresh thinking' like transdisciplinarity and critical reflection on 'being' as well as 'doing' in the world and our responsibilities as human beings to that world, are ways to go forward and accurately reflect the complexity of the world in which we now live. Transdisciplinarity "...aims to go beyond the 'strait-jacket' of mere problem solving into an era that does not negate disciplines and dilute them into some kind of epistemological soup". It rather generates the conditions for more "... metanoic solutions to managing complexity and the liberation of thinking and action from hegemonic paradigm islands". (Maguire, 2015, p.176)

Boulton *et al* (2015, p.10) have pointed out that the value of social knowledge and its complex nature is not new, as "...pre-Socratic cosmologies, evolutionary theory, complexity theory, and our own personal experience have arrived at a very similar viewpoint". By utilising this transdisciplinary approach Hadorn *et al* (2011, p.74) suggest that it is entirely possible to work effectively "...on a meta-level in striving for unity of knowledge". Through critical reflection and critical engagement legal educators are more equipped to look at and challenge the 'status quo' of what and how they educate. It is not an option to rely on the 'if it ain't broke don't fix it' adage. Legal education is changing because the world is changing, and we need our pedagogic style and content to adapt and change with it by analysing our teaching methods and by not being afraid to embrace the challenges of new requirements, especially those of the PGCert in higher education. This includes the use of technology in the classroom, which I utilise unreservedly. Michael Blissenden, a leading advocate for 'student device initiatives' blazing the trail in Australian legal education, suggests that "...modern day students are accustomed to using technology in their lives. This has resulted in a shift in higher education to tap into technology as part of engaging students with their active learning" (Blissenden, 2016, p.127). This can, as Blissenden points out, have enormous benefits pedagogically as

students have ready access to the internet, and, therefore access to unlimited material enables the students to investigate the factual background of cases which can further their engagement and understanding (2016, p. 132). I will return to the use of technology later in this commentary with examples of my own 'blended-learning' techniques.

'The PG Certificate in Higher Education'

Middlesex University (2017) states that "Studying the PGCert Higher Education provides an important grounding in teaching techniques and practices, as well as providing support mechanisms for the continuing development of your teaching practice. The programme is fully accredited by the Higher Education Academy (HEA)" They explain that it is now a "...vital developmental qualification for both new members of academic staff who are just embarking on a career in Higher Education, as well as those who may have been teaching for a while but have had no formal guidance in learning and teaching strategies" and perhaps most importantly remind all of us that it is "mandatory for all new members of academic staff 0.5 FTE and above who join the University, and should be undertaken within the first two years of service...[though]...you will not need to undertake the programme if you have achieved a similar, recognised qualification at another institution." It also leads to "...Fellowship of the Higher Education Academy (HEA) status" with a "...stepping off point of Associate Fellow of the HEA after two modules".

It has always been my belief, in line with PGCert training, that it is up to the educator to have vision and insight and to 'spot' if and, too often, when students are bored and disenfranchised. By their storytelling to themselves and each other and the teacher's storytelling and using direct eye contact rather than simply standing (or even worse *sitting*, in my view a pedagogic crime in a lecture theatre) and reading our own lecture slides, we need to take "...responsibility for this... changing [our] practice" and not just assuming that "...disengagement is simply inevitable" Jacobs, (2008, p.258). Jacobs points out that we should not forget that learning is an "...inherently messy process" and that current prescribed methods of teaching can lack the required flexibility. We need to create the conditions in which students can learn and we can learn from them. As Freire argues, if we achieve that, we get to a point where "no one

teaches another...people teach each other, mediated by the world” where the result aims to be “...true knowledge...true culture” (Freire, 1970, p. 53)

I believe that the inherent problem is that our current styles and techniques can seem inauthentic. If the teacher is not congruent with themselves they may be ‘doing’ more than ‘being’, ultimately boring the students, and boring is a form of killing, killing the energy in the other (Vera, 2018). As teachers, we want to open the minds of young people firstly to themselves and to their possibility in making an impact in the world. However, before impacting the world, they need to know something of how the world works so they can realise their own agency in it. I suggest that this is exactly the kind of reflection that is needed by us as educators, to reflect on our own histories and positioning so that we may be more aware of the position of our students. It has been suggested that students who “...simply follow the instructions without thinking...engage in surface learning; anything taught is almost immediately forgotten” (Edwards and Hill, 2016, p.107).

I will be working far more closely with and personally embarking on the PGCert in the coming academic year. This is not just because it is a requirement, but because I passionately believe that it is vital to learn and keep learning the practice of teaching, but at the same time critically reflecting to ensure that as an educator it is possible to go far beyond what the materials suggest and what the teaching observations require.

I support the notion that critical reflection on self, the context and the practice, is the start-point to becoming such an inspiring and effective educator. I am also aware however that self-reflection *per se*, isolated and lacking purpose can be counter-productive. As Arendt points out, reflection which fails to address a gap in knowledge can itself can be paralysing. (Arendt, 1971). Citing her attendance at Eichmann’s trial as a major contributor to her “...pre-occupation with mental activities” (Arendt, 1971, p.3) Arendt goes on to point out that it is “...this absence of thinking...” (p.4) this failure to ‘stop and think’ which can lead to acts of evil. In relation to education, Brockbank and McGill (2007) apply Vygotskian social constructivist theory arguing that self-reflection is a vital component in an educator’s toolkit. They suggest that educators “...are deeply influenced by our life experience, that learning contexts in higher education (as elsewhere) are themselves social constructs, that knowledge is socially constructed and that when learners enter and experience higher education they enter

a system that is not value free and where power is exercised that can influence the progress and learning of a student learner” (Brockbank and McGill, 2007, p.14).

I have always been aware of my ‘power’ as an educator, and careful to exercise my influence productively. However, this doctoral critique has given me the opportunity to engage in critical self-reflection in a more far-reaching manner. As a ‘butterfly’ in my previous roles, I had, as the authors illustrate, a “...tendency to self-deceive, collude and be unaware...” (Brockbank and McGill, 2007, p.5) all driven by a failure to step back and self-reflect. Reading the authors’ work, I find it affirming that they too begin with telling their own stories, a critical autobiographical positioning, exactly as I am about to do. They explain that they firmly believe that their own learning experience has influenced their approach as academics and educators arguing that rather than be contaminated by personal issues, they state that they “...positively value the personal” (2007, p.10) and learners too should be “...appreciated first as persons, with histories and real lives” before the teaching process can begin. (2007, p.10). This sharing of past experiences is also central to Dewey’s ‘criteria of experience’ theory where he strongly argues that an experienced educator has “...no right to withhold from the young on given occasions whatever capacity for sympathetic understanding his own experience has given him” (Dewey, 1938, p.38). It is always rewarding when my students feedback to me that my sharing of my own experiences through law school, and my personal advice on how to master the complex law examinations has shaped their own strategy and revision planning. I echo Dewey in that it is my belief that we as legal educators have ‘no right’ to deny our students this very practical and often vital advice based on our own reflections from our past experiences. As Dewey points out, an effective educator must have a “...sympathetic understanding of individuals as individuals” which allows the educator to have “...an idea of what is going on in the minds of those who are learning” (Dewey, 1938, p.39).

Consolidating the work of authors such as Dewey and Schon, Moon also argues that reflective practice can enhance an educator’s ability to ask the right kind of questions, allowing learners to apply the content of their taught subjects to everyday life (Moon, 2000). Moon goes on to cite the views of Habermas and Dewey arguing that “...reflection serves to generate knowledge” and has the “...common-sense view” that reflection is a “...mental process that is couched in a framework of purpose or outcome” (p.15). Brockbank and McGill (2007, p.173) propose that critical self-

reflection allows the educator as facilitator to relate to their learners in a "...humanistic, holistic and psychodynamic" manner citing the 'Johari Window' model in which each quadrant or pane of the 'window' "...represents one person in relation to others, with each quadrant revealing awareness of behaviour and feelings" (2007, p174) which facilitates "...reflective dialogue with the purpose of enabling reflective/critical learning" (2007, p.175).

It is often uncomfortable as an educator to share with your students personal past moments of pain, hardship and even failure. There is always a barrier erected as a form of self-protection, the fear of not wanting your students to see you as ever having been vulnerable. This Joharian disclosure seems to run contrary to what Freire refers to as the need to feel superior as "...the boss...the only one who knows things and is able to run things" (Freire, 1970, p37). In my teaching, reflecting on my past career but also on my lineage and heritage, I often disclose such moments and in so doing, I am able to link education and experience, allowing me as an educator to, as Dewey advocates, lead students "...into new fields which belong to experiences already had..." (Dewey, 1938, p76).

Beginning with Part One, a critical self-reflection of my early life and career, this doctoral commentary is positioned to facilitate the inspiring teacher not to be 'like me' but to develop their own potential. "Reflection-in-action necessarily involves experiment" (Schon, 1983, p141) and this commentary is such an experiment to enrich the repertoire of the legal educator practitioner.

Part One:

A Critical Reflection

Part One

Introduction

The Search for Meaning

'Man does not simply exist but always decides what his existence will be, what he will become in the next moment' (Frankl, 1992, p.76)

In many traditions, it is important to honour your lineage, to acknowledge that your identity is linked to others on whose shoulders you stand. This was always true of Jewish tradition but became even more significant when so many millions were wiped out in the Holocaust. It may be painful at times to reflect on the past in order to truly discover your own identity and explore your influences and motivations, but as Bettelheim, a concentration camp survivor and prominent child psychiatrist stated "...what cannot be talked about cannot be put to rest..." (1960, p.27). Bettelheim's relevance is palpable. A highly controversial psychologist and writer, just like my father Bettelheim was born in Vienna and studied at the University of Vienna in the late 1920's and early 1930's where my grandfather Elias was a Professor. Bettelheim survived the concentration camps of Dachau and Buchenwald. My grandfather did not. He was deported to Auschwitz but was sent straight to the gas chamber on the day of his arrival.

It is my lineage, influences and motivations which position my story and have driven me to analyse, as Frankl puts it, my "...specific vocation or mission in life..." and my "...specific opportunity to implement it" (Frankl, 1992, p.82). It is also of significance that Frankl was also a psychologist and survivor of Auschwitz, was also born in Vienna and studied at the University of Vienna. Like Bettelheim, his experiences in the death camps shaped his work, his philosophical approach and his publications. This doctoral commentary is in many ways, my own 'search for meaning'

I was born in Nottingham, England on 7th April 1966. My father was Erwin 'Charlie' Schatzberger, born on August 24th, 1929 in Vienna. He arrived in the UK aged just 9 years old speaking only Yiddish, a Jewish refugee from Nazi-occupied Austria. How he escaped from Austria after the annexation of Austria by Nazi Germany in March 1938, the *Anschluss*, is an inspiring story which has deeply influenced the values that I hold and which informs my professional practice and public works.

My mother was Arline Norma Dawn Wise, born on May 5th, 1937 in Camden Town London, to very traditional first generation East End Jewish parents, Marie and Charles Wise. Grandma Marie's parents, Julia and Solomon Goldsmith, were born in the Netherlands, whilst Grandpa Charles was descended from Polish Jews. They all ended up in Nottingham in the early 1950's, survivors in different ways.

Frankl (1960), disagreeing with the Freudian view illustrated by Walton (2002) believed our primary drive in life is not pleasure, but the discovery and pursuit of what we personally find meaningful. What I find meaningful is to help people do more than merely survive. It will not come as a surprise to know that this critical engagement is dedicated to my late parents and grandparents, to the notion of going beyond survival. Without their inspiration, I am not so sure I would have developed a passion to try to inspire others.

The first chapters are positioned as a critical autobiography (Eastman and Maguire, 2016; Lazos, 2000) as I explore the values that inform me. The public works themselves are presented as being valuable and influential in different contexts, as I aim to demonstrate tangible evidence of changes or new policy initiatives directly linked to my practice interventions. What connects them are values and ethics, a strong drive towards acceptance of difference, making something out of what at first appears to be very little, helping people to reveal and develop their potential, especially pedagogically within what Vygotsky termed “the zone of proximal development” (Vygotsky, 1978, p.86). My journey has followed an indirect route as will become evident. At the age of 36 I decided to study Law, at the age of 40 I qualified as a Barrister of Middle Temple, and at the age of 51 I am writing this doctoral commentary as a member of the staff of a university where I have been a practitioner and an educator in law for just over a decade.

For the first time in my professional life, I have been given the opportunity and the encouragement to reflect on this route which has informed my educating role so that I

can not only extract learning for myself but also articulate coherently what it is that informs my teaching and how it can be used to develop others, a kind of 'bottling' of techniques and approaches so that others may perhaps be inspired to reflect on what being a legal educator actually means.

I would be delighted if the result of this critical engagement was a contribution to dispelling that dismal phrase coined by George Bernard Shaw (1903) that “He who can, does. He who cannot, teaches.”

1 Out of Austria

My paternal grandfather was Elias Schatzberger, born in what was then a small rural village called Horodenka, part of the Austrian empire. Until the mid-1990's my grandfather was to me a mythical figure, and all I knew about him came from stories told to myself, my brother Simon and sister Julie by our father Erwin, known to his nearest and dearest as 'Charlie'. My father had often told us that his father was born in 1891 in a little *shtetl* called Horodenka which sat at the foot of the Carpathian Mountains. As described by Petrovsky-Schtern (2014) the 'shtetl' was a market town inhabited mostly but not exclusively by Jews. My father used to liken this to the sleepy Russian shtetl of 'Anatevka', home to Tevye and the villagers in the musical 'Fiddler on the Roof'. Elias was one of a large family of 9 brothers and sisters, whose family took the surname 'Schatzberger' as a given family name by the authorities in the early 1800's. In the late 1920's Elias took a job teaching at the University of Vienna. Perhaps my 'specific vocation' referred to by Frankl (1960) was not so much a choice but was 'genetic' all along. I am struck by how much that means to me that he was a teacher at University. For me this is a moving link as after all of my professional adventures I found myself teaching at a university - a kind of familial closing of a circle, picking up the baton again.

In the late 1920's Elias had met my paternal grandmother Otilie [Grandma Tilly] Wendel, a Polish immigrant to Austria, and they married at the Vienna Synagogue. My father was born in Vienna in 1929. My father spoke little of his early childhood, other than telling us that the family lived on Untere Donaustrasse in central Vienna and he often enjoyed walks with his father along the canal there on the way to the synagogue on the Sabbath. I found my father's childhood house and retraced his steps along the canal in Vienna on my very first visit to the city in 2009. The customs officer at Vienna airport welcomed me to Austria saying 'welcome home Herr Schatzberger' – a poignant moment.

In March 1938, the *Anschluss* took place with Germany's annexation of Austria and very quickly, as an Austrian Jew, my grandfather's teaching position and livelihood were gone. The story then took a fascinating and bizarre twist. My father told us that one particular night Elias was out for a walk by the canal, after the newly-imposed

Jewish curfew. He was stopped by a 'Brownshirt' officer and feared that he would be taken away and beaten for defying the curfew. This had already happened once before a number of months earlier when apparently, he disappeared for days and returned home badly beaten. This clearly did not stop him from his second defiant walk, but this time he was a little more fortunate. The officer recognised Elias, as the officer had been taught by my grandfather at the University. His teaching saved his life that day which tells me something about the regard in which he was held for it to transcend the fear of the new third Reich engendered in its soldiers. He told my grandfather that on this occasion he would turn a blind eye, but he gave him a chilling warning. The warning was to get his children out of Vienna quickly as things were about to get far worse for all Jews. My grandfather managed somehow to organise it so that my father, and my father's elder brother Kurt, would join a Jewish youth group and head off by boat to the Yeshiva in Gateshead, England. The Gateshead Talmudical College in Newcastle is still there to this day and is now the largest yeshiva in Europe and one of the most prestigious in the Jewish orthodox world. At that time in Austria, apparently so as not to arouse too much suspicion as to what was to come next, the authorities in late 1938 and early 1939 were still allowing such groups to leave the country. My father and Kurt did exactly that, and my father told us that at the age of nine he waved goodbye to Elias at the train station never to see him again. Only years later did I begin to understand the devastating impact this had on my father and the irreparable damage it caused him.

My grandmother Tilly also managed to get out of Austria in early 1940 and get to England on a work permit. Tilly and her two boys were eventually reunited and settled in Loughborough in the Midlands after my father and Kurt had spent some time at the Yeshiva, though only really as a way out of Austria rather than as true Talmudic scholars. My grandmother, a very formidable and quite typically tough Polish Jewess, left Austria with nothing. The story goes that on her departure she was leaving their apartment with just one potted plant. My father told us [many times] that on her way out, flanked by a Nazi officer, she was holding the plant, at which point the Nazi told her that she could not take a single thing and proceeded to knock the plant pot to the floor. It is said that some family diamond jewellery which had been hidden in the plant pot by my resourceful grandmother fell to the floor and was 'confiscated' by the officer. However, while she got out of Austria, my grandfather Elias was not so fortunate.

I did not really find out what had happened to Elias until the mid- 1990's. My father Charlie died in 1991, never knowing the full story of his own father's fate. He knew that Elias had gone on the run, again, clearly not one to lie down and resign himself to defeat. He managed to get himself across Austria and into France, where he sent a postcard in 1941 to Tilly and the boys saying that he would be with them soon. My father told us that was the last he ever heard from his father and had no idea what had happened to him post-1941 despite having checked Red Cross records and the records of Yad Vashem, Israel's official memorial to the victims of the Nazi Holocaust established in 1953 on Mount Herzl in Jerusalem. Of course, at this time there was no internet, no world-wide web, so my father relied on letters which never bore fruit. Only years later, and now a step-father myself, am I beginning to understand what a profound and damaging effect this had on my father and the relationship he had with my mother, myself and my siblings. That relationship has in turn shaped my own life and the values that inform me. It is exactly this manner of "Self-reflection and cultural critical consciousness..." which Gay and Kirkland (2003) suggest is "...imperative to improving the educational opportunities and outcomes for students..." especially those from culturally-diverse backgrounds.

With the advent of the internet during the mid-1990's a periodical search of my grandfather's name on the web produced information that eventually went some way to completing the story. His name was on the website of a New York artist called Melissa Gold. She had painted pictures representing a number of deportees on a 1942 convoy from the Nazi Drancy detention centre on the outskirts of Paris. This 'holding camp' was where all Jews were held who had been rounded up in Nazi occupied Vichy-France. Starting in 1942, mass deportations from Drancy to Auschwitz and other death camps began. The deportations happened from 1942-1944 and over 75,000 Jews were deported from Vichy-France. All but around 2500 were killed in the camps. Melissa Gold had found a copy of Nazi deportation records set out as a book put together by Serge Klarsfeld (1983) the French activist and 'Nazi-hunter' renowned for documenting the Holocaust. Klarsfeld had obtained Nazi records which he discovered hidden under the floorboards of an apartment in Paris of all convoys from France to the death camps, meticulously kept by the Nazis, detailing names; dates and places of birth; and dates of each and every convoy from 1942-1944. This book of records, with the names and details of the 75,000 Jews deported, contained a list from one of

the convoys known simply as 'Convoy 42, November 6, 1942' from Drancy to Auschwitz. On the list was Melissa Gold's grandfather. She decided to take several other names from the same convoy and depict them as paintings, but only names which had a link to nature and the natural world. Of course, Gold was the inspiration for her idea, but many other Jewish surnames also had links to nature. The list also included the name Schatzberger, which translates as 'Man from Treasure Mountain'. *Schatzberger, Elias, 12.09.1891 Horodenka* was on the same convoy as Gold's own grandfather. Klarsfeld (1983) explains that this convoy included 478 men, 504 women and these numbers included 221 children under 18, half of which were under 12. He explains that the records show that there was a 'routine telex' reporting this convoy's departure composed by SS Heinrichsohn and signed by Rothke his superior. The convoy left the station at Le Bourget/Drancy on November 6 1942 at 8.55am for Auschwitz. In 1945, there were just 4 male survivors. I emailed Melissa in New York, and I am immensely grateful to her that she not only sent me a copy of the painting of my 'man from treasure mountain' but also sent me a copy of the Klarsfeld book so I could see my grandfather's details in black and white.

After some further research which included tracking down and even meeting one of my grandfather's nephews now thriving in a large family in Haifa, Israel, we discovered that Elias was a soldier in the Austro-Hungarian army in World War 1 and my new-found cousin gave us a copy of the only surviving photograph of Elias. It was only with this wonderful gift that my grandfather finally became much more than just a character in a dramatic story. Sadly, and perhaps inevitably, we also discovered that at the age of just 51, after having spent a year in the detention camp, Elias arrived at Auschwitz on the cattle trucks from Drancy and as he was deemed to be too old and frail to work, he was selected on his day of arrival to join the queue for the gas chambers and verification from Red Cross records confirmed that he was killed on his first hours in the camp. It was not until April 2017 that I visited Auschwitz-Birkenau for the very first time. In fact, this was the first time that any of my close family had visited Auschwitz. It was one of the most poignant moments of my life to finally be able to say the Yahrzeit memorial prayer at the spot where my grandfather was murdered in 1942. I stood on the train tracks which transported my grandfather into the deathcamp and walked the 500 steps to where the gas chamber stood where he was put to death on his arrival.

Although I did not discover my grandfather's fate until I was almost 30 I had always been conscious of this dreadful possibility, but more than that, what has really influenced, shaped and motivated me, and which has deeply influenced the values that I hold and informs my professional practice and public works, is the profound effect my family heritage had on my early childhood. Cowan (2006) suggests that it is precisely this level of critical self-reflection which can result in innovative pedagogical practice. At the time, as a child and then young teenager, it was difficult to make any sense of it all but finding out about the fate of my grandfather helped me to reshape negative experiences into positive action. As Davidson (1977) suggests it is often apposite to be reminded of the words of the Italian intellectual Antonio Gramsci, himself held a prisoner by another fascist, Mussolini for eleven years, 'I am a pessimist because of intelligence, but an optimist because of will'.

I feel that what drives me is the understanding that traumas inflicted on innocent people can carry on for generations distorting identity, meaning and hope for the young. I am faced every day in my university in London with the faces of first and second-generation exiles, young people whose parents and grandparents have been driven from the homes of their birth by oppression, war, torture and famine and for the first time through recovering my own story I am beginning to articulate what it is I feel so attuned to in their situation and how will to action is core to my teaching philosophy. As Giroux (2011, p.12) has theorised, pedagogy is a "...political, moral and cultural practice..." and as such my self-reflection allows me to innovate, and, as Schon (1983, p62) describing the views of Tolstoy put it, "...endeavour to develop... the ability of discovering new methods to ensure that my teaching is not based on a 'one-sided method' but is 'an art and a talent' to be used to inspire others". That art and talent can also be from transforming pain into action; we cannot let the tyranny of others rob the children of survivors of their identity, their pride and their hope in a better world. They need tools, and the art of learning is what we can facilitate in them. As King (1993) suggests, espousing Vygotskian social constructivism, my pedagogical approach, grounded in self-reflection allows me to be the 'guide on the side' rather than the more transmissionist 'sage on the stage'.

2. Dutch Courage and the Blitz Spirit

I return here to my family to explain a little more about the complexities of those influences. As my grandmother Tilly and my father were settling in the UK, my maternal grandparents Marie Goldsmith and Charles Wise were already settled in the East End of London. My grandmother Marie, who played a substantial role in my early childhood, was born Miriam Goldsmith in London in 1908 to Dutch immigrant parents Julia and Solomon Goldsmith who were both born in Amsterdam in the 1880's and married in the Groot Synagogue there. Solomon's parents were the delightfully named Nehemias Goudsmit and Rachel Matfenbuthel; Julia's parents were Moses and Angeltje Waterman. They then settled in London in the early 1900's. They lived first in the Whitechapel/Aldgate area of London's old East End, and moved the family to Stamford Hill, London, where they lived with their 9 children in a small house. My grandmother had older sisters one of whom, Jenny, as the sole surviving sister, played an influential role in my childhood, and I remember her fondly. The entire family was extremely matriarchal with very strong-willed and dominant women at the forefront. Jenny had four daughters herself. My earliest childhood memories are of these impressive and powerful women, none more so than Grandma Marie. She embodied every value I grew up to admire, from strength and tenacity to a totally positive attitude and enormous resilience, and through it all a sense of humour that I would describe as a cross between the noted American entertainment figures Woody Allen, Joan Rivers and Walter Matthau!

My maternal grandfather, Charles Wise was the son of Polish immigrants. Grandpa [Papa as we called him] was born Carl Wiseberg on 9th August 1905 in London. He seemed to have unofficially changed his surname, as was the 'fashion' then, to Wisebad and then to Wise. My maternal great-grandparents were Ada and Abraham Weissberg, from Warsaw, Poland and came to England in around 1890. Abraham was a very typical Jewish immigrant tailor living and working in the old East End.

Although Papa died when I was six my memories of him have been lasting and formative. Charles and Marie met and were married in London on 2nd September 1934 at the Stamford Hill synagogue literally a few doors away from my grandmother's family home, and my mother Arline was born in Camden Town London in 1937 where my grandfather owned a barber shop.

World War II came and both strands of my family ancestry began to draw together. By 1939 my father and his brother were already, and more than fortunately, in the UK and in 1941 Grandma Tilly joined them and the family, without Grandfather Elias. They settled in Loughborough where my grandmother made ends meet by setting up her own business, a market stall selling leather goods such as handbags and purses. I have literally never really thought about this until I write this today, but she was a single mother, an immigrant twice over from Poland and had got herself out of occupied Vienna, speaking only Yiddish and set up her own business in the 1940's. This demonstrated incredible, and to me, humbling resilience, strength of character and above all a desire not to be defeated or be seen as a victim. She went into action as a way of coping with the horror from which she had escaped. On the other side of the family Marie and Charles faced the Blitz in the early 1940's, seeing friends and family injured and killed and many made homeless in the East End. Neither of them talked much about this time though Grandma Marie did tell us more as she [and we] grew older. During those days as many did, Marie and my mother packed up and went to live on a farm owned by one of my grandfather's customers, in Newquay in Cornwall to escape the Blitz. My grandfather stayed in London where he was a Home Guard during the war. In 1945 my Uncle Sidney was born just over a week after V.E Day, the formal end of World War II in Europe. Uncle Sid remains to this day a positive influence on my life and my choices. Sid was the 'action hero' as I grew up, always resourceful; a successful business man; karate black belt instructor; child snooker prodigy and deep-sea diving instructor. He even survived a horrific head on car crash in 1970. If we needed a job doing, it was always "call Uncle Sid". Apart from all of that, Sid embodies all that is good in a person and his work ethic and values are to challenge your limits and harm no one.

These two families combined to create the Schatzberger family. After the war was over Tilly and my father moved to Nottingham where there was a thriving Jewish community only a few miles away from Loughborough. Uncle Kurt apparently moved to London and 'became' an East End Kray-style gangster! Tilly kept her business going in Loughborough, travelling there every single weekend from the late 1940's right up to a week before her death in 1977 aged 82. Rain, snow, hail wind and sun, this formidable survivor hardly missed a week of standing as a market trader. Her effect

on me growing up however was a different matter, but her work ethic, inexhaustibility and refusal to stop were values I always intended to emulate.

My father alongside his mother, set up a chain of high street stores and market stalls in and near Nottingham while Tilly ran Loughborough market. I remember one day being in the shop with Grandma Tilly, and her having a disagreement with a customer. As the customer left Tilly shouted, 'Thank You' to the customer as she walked away down Pelham Street, only as my father explained later it wasn't Thank You but rather 'Chrank you', a Yiddish expletive! The customer was none the wiser.

My maternal grandparents moved to a thriving Jewish community in Bournemouth and then in the 1950s, to Nottingham where they took up the challenge of running the Jewish Youth Club in Nottingham where my parents met. My father was an absolute singer-showman, my mother, the woman who fell in love with his voice. I would say, and my students would agree, that performance and storytelling is a key ingredient of my teaching style, but I have yet to sing to my classes! It is not too far a stretch of the imagination to identify my father's showmanship as the root of my own desire and passion to 'perform'. As Bohler-Muller (2010, p.50) suggests, storytelling enables a legal educator to "...shatter the formulist shells in which law school tends to encase students...". Otherwise, she argues, reading law books can be like "...eating sawdust". The central performance and storytelling aspect of my pedagogy will be examined later.

3.The Family Schatzberger

After the marriage of my parents in 1957, my grandmother – who lived with the newly married couple - viewed my mother as the outsider and there were many occasions throughout my childhood when we witnessed awful arguments between the two women, often with my father siding with his mother. This far too often spilled into physical violence. Looking back now, I can at least fully understand the trauma that both my father and grandmother had experienced and how this had shaped their lives. I can say that I witnessed first-hand the impact trauma has. On the one side there is the drive to ‘doing’ but, on the other, trauma can prevent a person from ‘being’ all they can be, and this stunting of balance can in people, lead to violence and fear of loss, making people possessive. I can see how this may well be behind some of the frustrations of my students, they may smile, they may look busy, but they can also be lost inside, frustrated and angry. It is not perhaps surprising that one of my character traits is the need to rail against injustice and to try to assist others not just to survive, but to live their lives to the best of their ability and potential. As Vygotsky (1978) suggested tapping in to this ‘zone of proximal development’ is exactly where an educator can make all the difference and I have come to understand that this is central to my pedagogy.

As a child, I did not link the experiences of my father and his mother to their actions against my mother. There have of course been many studies in recent decades on so-called ‘survivor guilt’ and Kaplan (2014) refers to studies by researchers such as Bower (1996); Yehuda (1998) and Fogelman (1999) which suggest that Holocaust survivors such as my father and grandmother who though were not in a death camp, survived the Holocaust when other close family members perished, experience depression, PTSD separation anxiety and aggression. However, Kaplan points to another study by Helmreich (1992) which equally suggests traits in survivors and children of survivors such as resilience; adaptability; initiative; tenacity; being task-oriented and expressing more favourable attitudes toward family, friends and work. The latter traits were also suggested by Leventhal and Ontell (1989). I would like to think that I recognise some of these latter traits in myself, certainly in relation to my role as a legal educator. I would like to think that my childhood experiences have deeply influenced the values that I hold, and which have then gone on to inform my

professional practice and public works. As stated at the outset this is the first opportunity that I have had to reflect on this route which has informed my educating role, so that I can not only extract learning for myself but also articulate comprehensibly what it is that informs my teaching and how it can be used to develop others. Moon (2006) describes reflection as a 'human process' and emphasises that it can result in enlightenment and creativity in the reflective practitioner. It is, I would argue, possible and indeed necessary for all those engaged in pedagogy to reflect on their own route and consciously articulate how that reflection can inform their own teaching practice.

As traumatic as my childhood environment sometimes was, this was to a certain extent, counter balanced by many positives. I have a brother and a sister, and we share a number of characteristics but most importantly we are driven to help, to perform, to be whole as if we can stop the poison of trauma from going any further than it already has. My younger brother Simon has been my constant friend, companion and confidant from our shared school days when we were both avid chess players, representing our County in the Under-10 category and eventually getting him to join me 'on the boards', in many plays and musicals both at school and outside of school. My brother went on to be, and still is, a professional actor (performing genes seem to be as strong as the teaching ones.). At 16 he took the role of Adrian Mole in the very first stage adaptation of Sue Townsend's blockbuster books 'The Secret Diary of Adrian Mole', then appeared amongst other things in Spielberg's Band of Brothers. Last summer he performed in his own one-man Woody Allen stand-up show at the Edinburgh Festival.

My inspiring sister, Julie, is another performer singer and songwriter, but above all she is perhaps the most ethical individual I know and was a great support when our parents passed away. For her, adversity is always an opportunity. I fantasise that my grandmother Tilly had the same attitude but without the wholeness of my sister; because she had to survive, thriving was not an option, the trauma had been too severe. I strive to cascade such ideas to my students in an effort to influence their shaping, not just professionally and academically but personally and socially. There are not many people who would know by looking and listening to my siblings and me that there is such darkness behind the exterior. I try to remember that when a student is disconnected, not performing to their potential, that there can be things we know nothing about and may know nothing about. Teachers are often cited by members of

the public as having been the person who changed their direction for the better. As a teacher, I am proud of my profession whenever I hear this and dismayed when I hear or witness an educator abuse or misuse their position.

My grandma Marie was a positive force not least because of her incredible relationship with my mother constantly giving her the love, support and encouragement which was often missing at home. I was very aware as a child of my grandma's work and family values, her strength and her tenacity. My Grandfather Charles, who taught me to read Hebrew and recite Shakespeare and to play chess, all before I was 6 years old, was also a hero to me at that time. I used to go to my grandparents' house every Saturday without fail and even today, I still carry with me something he said. He would tell me that I should always try to learn something new each and every day. This appetite for learning has never left me. It is also one of the key elements of my teaching style, I passionately want my students to leave each and every lecture having learnt something new, something they never knew before my lecture on that day. As what Vygotsky (1978) referred to as the 'More Knowledgeable Other' the role of the educator is to be exactly that – the one to educate, inspire and develop the student. It is, as Harvard professors Schwartz, Hess and Sparrow (2013) suggest, important to be committed creative and compassionate and these are values I have learnt especially from my grandparents. I was devastated when my grandfather died from a heart attack in 1972. I have never forgotten him.

As for many people the loss of parents has a profound influence on their children regardless of how old those children are. My parents died over 25 years ago, my mother from cancer at the age of 49. I was her primary carer at the age of 20, and my father died five years later of a heart attack. The pain of the loss of our mother has never quite left us as she, I believe, was a large part of us being able to recover our wholeness which could not be destroyed by the insanity and cruelty of twentieth century fascism. Just seven months after my father died, the matriarch of the family, our great-aunt Jenny also died and at that point it seemed that my grandma Marie, now aged 84, gave up her fight and she too passed away in the September of 1992. The end of an era. The days of my childhood seem an ever-distant memory. I have never talked about this period in our family life to anyone other than close friends, partners, and family members but as Bettelheim (1960) said if a memory cannot be talked about, it cannot be put to rest and it will fester. Reflecting on my role as an educator, I recognise that what was very personal is also universal. Many of my

students' parents and grandparents are survivors of 20th and 21st century post-colonial wars and conflicts, famine and state oppression. I strive to demonstrate that education and respect can form a bridge into sanity and wholeness. This responsibility as a teacher in higher education is considerable because of the deficits of school where pressure on teachers' time and resources can make individual caring for children who have become the supporters of their parents through circumstances of, for example, exile or low incomes or ill health, almost impossible to manage. Children can be exposed to the tyranny of others when their home circumstances leave them emotionally and physically vulnerable. As Horkheimer suggests, Critical Theory dictates that there should always be a striving to act as a "liberating ... influence", and work "to create a world which satisfies the needs and powers" of human beings (Horkheimer and Adorno, 1972, p.246). As educators it is within our power to try to achieve this with and on behalf of our students.

My childhood experiences, as any psychoanalyst will suggest, shaped my life as it shapes the lives of my students. I believe I have sought to address injustice and the efforts and patience needed to reconcile differences, in the full realisation from family history and childhood experiences, that reconciliation is one of the most complex acts to achieve. As Frankl (1960) suggested, I was not just about to '...simply exist...' I was now adamant that I would be the one to decide what I '...will become in the next moment'. My lineage, influences and motivations were about to drive me forwards to slowly discover my 'mission in life'.

4. The Road Not Taken

My grandfather taught me to play chess, understand horse racing, taught me to read and write in Hebrew at the same time I was learning English, and most importantly to read, understand, memorise and recite passages from the plays of Shakespeare. One of my proudest possessions to this day is a Complete Works of Shakespeare given to me by my grandfather with his written inscription hoping that one day I would become a great Shakespearean actor. This did not quite materialise in the way that I or he had hoped it would, but the result was almost two decades of acting and performing as often as I could. This, as Frankl (1992) put it, was my mission in life at that time. I knew from the age of 5 onwards that I would be a professional actor one day. This was the road that I had chosen for myself and the path I would follow. Looking back now, with the benefit of hindsight and reflection, it could be argued that this was my way of escaping, my way of being someone other than me given the somewhat turbulent events at home. This 'escape theory' has been commonly cited, including by such actors as Griff Rhys Jones in his reflective autobiography 'Semi-Detached' (2006)

However, I really believe that this may be a rather over-stated analysis, as I had found a passion from the age of 5 onwards for which I seemed quite well-suited. With grandfather as a major influence and with my gregarious mother and showman father, my early life choices were perhaps genetically programmed. In fact, my professional actor brother and professional singer/songwriter sister are perhaps evidence that for all three of us some manner of performing lifestyle was on the cards from day one.

At the age of 5, just before my grandfather passed away, with his tutelage I learnt memorised and recited the entire 'Once more unto the breach...' speech from Henry V to a suitably impressed, or perhaps more suitably shocked, huge family gathering at my grandparents' summer garden party. To me though, my Uncle Sid's 'garden party finale' Karate display of smashing flaming roof tiles in half with his bare hands was the ultimate act of skill and heroics.

I had 'the bug' though and all through infant and junior school I performed in as many shows and plays as I could, from dramas, to comedies and musicals. Throughout secondary school, I performed in every production possible. These included a rather more child-friendly musical performance of 'Aquarius' from the musical Hair to the Wizard of Oz and playing the Artful Dodger in 'Oliver!' At the age of 11, I joined the

local 'am-dram' society and reprised my role as the Artful Dodger at the Co-Operative Arts Theatre in Nottingham. In the same year I played the part of 12-year-old Jack Holroyd in a dark and rather gruelling play by D.H Lawrence about a local mining family with an abusive and violent father. I also played the part of a one-armed Sergeant-Major in a supernatural adaption of a 1902 short story called 'The Monkey's Paw'.

All of these extra-curricular dramatics didn't seem to affect my academic studies too negatively as I left school with 8 decent O' Levels and didn't hesitate to enrol on the highly-regarded Drama A' level course at Clarendon College, Nottingham. Whilst at Clarendon, apart from gaining two A Levels, I was constantly learning scripts and performing. I played everything from a blackbird in Aristophanes' 'The Birds' to Caesar in Shakespeare's 'Anthony and Cleopatra' and Richard in 'Richard III'. I had at least gone some way to achieving my lofty Shakespearian ambitions! Having done all of this by the tender age of 18 I then tried to gain a place at Drama School and spent much of the summer of 1984 auditioning for as many as I could, given there was an expensive audition fee for each 'opportunity'. At this stage though, I faced the first major reality check in relation to the life of an actor. I was roundly rejected by all schools, most of them suggesting I was too young and too inexperienced in life! I did not give up and finally managed to secure a place at the Webber Douglas Academy of Dramatic Art but without an offer of one of their rare full scholarships I sadly could not afford to take the place. Typically, this only stopped me from the 'drama school route' but undeterred I decided that I would 'make it' as an actor by securing roles in professional theatre companies without the formal training. I was not about to give up a 15-year ambition without a fight.

At the start of 1985, less than a year after I left Clarendon, I secured my first actor-writer role working for Nottinghamshire County Council putting together an educational one-man show about life during the Ice Age. This show was to be written and performed inside a genuine Ice Age cave in an archaeological 'country park' on the Nottinghamshire/Derbyshire border. I devised, wrote and performed a 1-hour show for visiting school groups called '30,000 years ago'. This show was performed to different groups three times a day for 6 days a week for 6 months! It was the very first time I had lived away from home but was thoroughly enjoyable, and I probably learned my first 'educator' skill here of performing the same material many times whilst making each one seem fresh and spontaneous, something that would stand me in superb stead for my lectures many years later. Jonathon Shapiro (2016, 3-4), the Harvard

educated ex-trial lawyer and U.S attorney, law professor and now a top legal writer and producer of hit US legal TV shows suggests that "...the art of telling stories is the secret to success in life, law and business" and describes storytelling as "...the most effective means of changing minds and lives" whether in the courtroom or the classroom. The 'self-training' in this very first job certainly shaped and informed my professional practice in ways which I am now only beginning to think about consciously.

At the end of this 'gig' I returned home and immediately used my contacts in Nottinghamshire County Council to secure another 6-month tour of local libraries, taking my one-man show out 'on the road'. This rather entrepreneurial project created some work and some relatively modest income but much more importantly allowed me to apply for, and get, my Equity Card membership of the actors' union which meant that I was now a professional actor. It is still one of my proudest achievements given that it was like the holy grail back then to get 'your card' and also because my mother was so happy and proud of my achievement as she had been so unbelievably supportive of my ambition for many years.

Tragically though, this all took place at the start of 1986, the year my mother became very ill with cancer, and as I explained earlier for the rest of the year I put my plans on hold to take care of her as best I could. When she passed away at the end of 1986, I put my Equity card into action as quickly as I could. During 1987, I spent 6 months on a national tour with a 'Theatre-In-Education' company called 'Seagull' playing many characters in plays based on the Industrial Revolution and the invention of the steam engine. I then joined the National Youth Theatre playing Benny Southstreet in an Edinburgh festival production of 'Guys and Dolls' followed by a 3 month 'gig' at the Canal Cafe Theatre, in Maida Vale London performing in the satirical show 'NewsRevue' writing and performing a totally different show each week satirising news stories of the day. By the end of 1987 I was happy in the knowledge that I had worked as an actor all year non-stop, but not so enamoured of the fact that I was effectively penniless. It was time to think again.

Looking back critically, on the one hand there are the skills I learned and on the other hand there were benefits like trying on different identities, experimenting with who you are, working closely in collaboration with a small group, gaining confidence, being able to accept criticism, developing a thick skin, coping with rejection. I wonder how my students today get exposure to all that if they are not involved in such activities as

theatre, sport and, community work. These are what make the ground fertile for 'Mode 2 knowledge'. So-called Mode 1 knowledge is seen as 'structured and single-minded' whereas Mode 2 is seen as taking a different more untraditional approach to learning and teaching (Gibbons, 1994)

Students need confidence and context. Did I leave acting because I could not make a living at it? This is a problem for many of our students, the need to strive for earnings, the approach of 'just tell me what to learn to get the job and I will learn it'. If I am honest with myself, it was and had to be a significant reason for not going on with it. However, I also no longer had the drive to take up those difficult challenges of uncertainty because not all of me was engaged. There was a very active, enquiring, independent brain that perhaps needed a different diet.

There is no question at all however, that the skills I had learned as a 'storyteller' have informed my teaching practice. Research carried out at Texas University by Harbin and Humphrey (2010) have shown that storytelling as a skill is a powerful communication tool and that being able to tell a story effectively whilst teaching means that the listener is more engaged, and attention is focussed (Kouzes and Posner, 2002). Tyler and Mullen (2011) also suggest that stories are a critical means by which people navigate the tangled web of human experience and in teaching law, stories help to organise and even recognise information. As penniless as I was at the end of 1987 it is absolutely without question in my mind that my acting background, heavily influenced and motivated by key family members, played a major role in shaping and informing my teaching practice. I will expand on this in due course as I reflect on my public works, especially interrogating the literature on storytelling from a British educational perspective, but this 'Road Not Taken' certainly has, in my view, made all the difference to my role as legal educator. This was though, only the beginning of the 'less usual path'.

5. From Wig to Wig

At the end of 1987 I was in desperate need of a paying job. and took one in the end as Father Christmas in Harrods and was therefore ‘unemployed’ after Christmas Eve. However, as I had become quite involved in the management of the grotto rather than just ‘sitting in the chair’, I had come to the notice of Mohammed Al-Fayed, the relatively new owner of Harrods who offered me my first role in retail management in the Toy Department starting in January 1988. The salary and the security proved to be too tempting, and acceptance of the new role marked the beginning of what proved to be a 12-year period of moving from one job to another without a thought as to my ‘mission in life’ and a lack of any real meaning professionally speaking. This also, perhaps not surprisingly, coincided with a number of years of having family issues, especially with my brother, as I became more and more obsessed with my day to day work and lost sight of what really mattered to me. I left Harrods in 1989 to move back to Nottingham where I diversified into managing nightclubs in the city after dark and trying to rebuild my relationship with my father working with him in his market stall business every Friday and Saturday during the day. It did not last long and at the end of 1989 I moved back to London, and for the final time reprised my role at Harrods as Father Christmas until my new role as Manager of a well-known wine bar in Wimbledon began in early 1990. I managed ‘Bertie’s’ until mid-1991. Just before I left Bertie’s I went for one last audition, which I thought would be worth a try. I went for a mass audition at the Hammersmith Palais to be one of the TV presenters on Esther Rantzen’s ‘That’s Life’. To cut a long story short, I got through from 4000 auditionees to the final 7 and appeared as one of the presenters for two episodes of the show in March/April 1991. It was an early ‘X-Factor-like’ public phone-in vote which seemingly decided who got the job permanently, but it wasn’t me!

Having had enough of long hard shifts running a basement wine-bar, ending my year and a half there looking more anaemic than I had ever looked or felt, I got a job working for the Disney Stores which were then relatively new in the UK. I eventually became Store Manager in many stores and the training manager for the Disney Stores Europe, creating materials and training manuals for the ever-expanding Disney Stores. Working for Disney for the most part was exciting and often exhilarating, especially as it coincided with the re-birth of the Disney animated movies and the opening of

Disneyland Paris. However, I was still a number of years away from finding my true path. I left Disney after almost 5 years in 1995 to work as a General Manager for the then Burton Group but found this very staid and, to be honest, mind-numbing other than the challenges of running a store on a very tight budget. After 18 months with Burton, I was offered a General manager position in 1997 with TGI Friday's Restaurants which was in terms of culture much more aligned with the Disney outlook and approach.

Once again though other than the obvious challenges which come with a senior management position I never really felt fulfilled or satisfied that I was engaged in any meaningful activity. As Nicolini (2012) puts it, in hindsight I was perhaps suffering from an unreflective grasp of my surrounding world and had been 'unreflective' for more than a decade. Nicolini points to Plato's 'Republic' where Plato suggests that "...needs, passions and appetites are sources of instability and disorder" and are distractions from "the pursuit of truth and knowledge" (p.64). My needs, passions and appetites certainly caused nothing but instability and disorder as I became focussed on living each day in turn rather than pursuing a longer-term agenda. Nussbaum (1986, p.27) also explained that Plato suggested that the "...best life for human beings is the life of the philosopher, a life devoted to learning and the contemplation of truth..." and without this contemplation, it is impossible to "...evaluate, rank[s] and order[s] alternative pursuits".

Another way of looking at this period of uncertainty is 'walkabout'; Campbell's (1949) journey of the hero both of which are periods of uncertainty where you try to exist in and in between a liminal space to find the treasure of existence, how you are to be, who you are to become. Gibbs and Maguire (2016) draw on the work of Beech (2011) in their paper on personal and professional values suggesting that one of the purposes of liminal space for the individual is an opportunity to reflect on their society and role in it in order to return to it "...in a new identity, with new responsibilities and new powers" (Beech, 2011, p.287). Many do not survive that liminal space while others emerge with their treasure only to find that others may not want or support it. Our students often see their time at university as liminal space and as teachers we are the voices and the guides helping them to find the 'treasure'. I recognise this state of 'wandering' and 'wondering' and my style of teaching, while it may not be orthodox, it seems to be appropriate to liminality. Once again, I would suggest that this approach

aligns itself with Vygotsky (1978) and his Social Constructivist theory in relation to education.

My liminal space was the time for me to reflect and contemplate on what I wanted to become, and my experiences had also let me know what I did not want to become and after discussions with friends and family, I decided at the age of 34, to enrol in University and ‘find my meaning’. Initially, I enrolled at London Metropolitan University to study for a degree in Arts and Events Management. The idea was to go back to my roots, to my passion, the Arts and Theatre, and learn how to manage a theatre company or perhaps to direct and/or produce plays or even movies. However, at the end of my first year I took a compulsory contract law module, taught by an inspiring New York attorney, and found to my utter surprise that it was the voice I had been waiting for. It was like a master locksmith with the key to a complicated lock. This was my ‘meaning’ and my ‘mission’ – the law. I have feedback from former students that I have facilitated such unlocking in them, again perhaps, out of awareness, I have been using my personal and professional experiences to help them. I found that I was able to read and understand case law and explain the complexities of the law with relative clarity and decided after talking with my tutor that I would finish my degree by focussing on as many law modules as possible. This is one of the key skills I learned which I can directly transplant into my own teaching. In my final year, I gained invaluable work experience as an ‘outdoor clerk’ working for a firm of criminal law solicitors, working on many criminal cases. This was my ‘discovery and pursuit’ of what I found meaningful and as such after graduating with a First-Class degree in 2003 I enrolled on the CPE (now the Graduate Diploma in Law) at the Inns of Court School of Law at City University, followed by the Bar Vocational Course and after graduating I was called to the Bar at Middle Temple in 2005. Without comparison, the night I was called to the Bar was the proudest night of my life. Almost 20 years after donning my wig as Father Christmas at Harrods, I processed with my good friends and peers through the halls of Middle Temple in my gown and a very different type of wig.

There was one final twist in the tale however. Before and just after graduating and being called to the Bar, I applied for pupillage at predominantly criminal law chambers. For many reasons, one being my age, another being perhaps the unquestionable though not insurmountable barrier of having a non-Oxbridge degree and another being that on occasion I did not perhaps do myself justice on the day of an interview, formal

pupillage eluded me. In my final year at law school a good friend and peer suggested that I would make a rather good University lecturer especially, as she pointed out, I had managed to explain complex points of law to my peers whilst at Law School with great clarity. I went along to see my previous law teacher at London Metropolitan University and I was offered 1 seminar a week. This then expanded after I graduated from the BVC, along with the offer of a teaching role at Middlesex University, where just under ten years later I am now Senior Lecturer in Law and sit on the Senior Management Team as Head of Learning and Teaching for the School of Law and Politics. I realised that teaching law and inspiring students was my 'true' passion along with helping people to reveal and develop their potential. It seemed that not only had I discovered my specific vocation or mission, but I now had the most incredible opportunity to implement it (Frankl, 1960) Of course, that other passion of performance was going to be part of the implementation.

Part Two:

Public Works

Part 2

List of Public Works

1. *Report on the 'Abuse of power, process and law; Malawi'; created and developed under the auspices of and published by the Criminal Bar Association [UK] (2004)*
2. *'Teaching Law – an innovative approach'; Text Book 'Business Law' - Pearson Publications (2011)*
3. *Text book 'Land Law – your Blueprint to learning' – Pearson Publications (2014)*
4. *'The Immigration Act 2014; 'Not on the list you're not coming in; Landlords forced to discriminate' – published in the Conveyancer and Property Lawyer (2015)*
5. *Consultation Paper 'The Role of Equity in English Law'; written for the Kazakhstan Supreme Court [work-in-progress]*

Public Works Themes

The themes I have chosen with which to interrogate my own works include humanity; working with and through difference; the desire to reveal and develop potential rather than just to survive and to inspire others to learn from not only a communal past, but from one's own lineage and heritage. I will be viewing my works through both a Social Constructivist lens especially the theories of Vygotsky and through a Critical Theory lens as propounded by the Frankfurt School. The works framework will include various explorations of the challenges, the professional dilemmas which arose, how they were managed, the value of research and the impact on my practice, as well as allowing me to provide tangible evidence as to the changes and policy initiatives directly flowing from these works. The chapters will also include a summary and critical reflection of what I learned but also how I learned it and what impact this has had on my teaching. I will aim to illustrate new insights which have arisen as I stand back as an investigator of my own works. I will set out my points of contact, my methods and of course, the resistance I faced. In Malawi for example, there were many who had a vested interest in corruption and a lack of human decency which perpetuated the terrible suffering. Horkheimer (1937b, p.63) states, citing the philosophy of Nietzsche, "What really raises one's indignation against suffering is not suffering intrinsically, but the senselessness of suffering". In Malawi, as a primary example, I needed to find a way to make sense of the senselessness. I will aim to illustrate the learning from each of the works and how that learning was taken and demonstrated in the subsequent public works.

My aim in this key section is to demonstrate that my public works themselves can be seen as valuable and influential in many different contexts, contributing to knowledge and practice in the public domain; be seen as opinion-leading; influencing both thinking and practice and having a significant impact in segments of the field. According to Horkheimer and Adorno (1944, p.11), "Humans believe themselves free of fear when there is no longer anything unknown" and it is my personal and professional position that my role then and now, in both my early practice and later in my pedagogy, is to work to remove, as much as practicable, the unknown. Each of these public works

feeds into my own pedagogy and philosophy of education and what is transferable to others. What is taught or can be taught certainly comes from within but also is firmly rooted in knowledge, experience and critical reflection which bridges the personal and the professional. I am struck by how much resonance I have found in a range of writers and commentators from philosophers to educational psychologists whom I have sought out during the process of this engagement with my own works. Perhaps Dewey (1938, p.39) best sums up what will now be 'consciously' at the core of my working life. Reflecting on and using your own experience, he writes, influences the "...formation of attitudes of desire and purpose". To ensure that experience does not mean repeating the same thing over and over again, this context statement has engaged me in a dialogue with myself and demonstrated the difference between relying on the same old box of tricks for new audiences and making every experience interconnected with other ones so that learning is in a constant state of evolving. Experience has to be a powerful "moving force" (Dewey, 1938, p. 38).

My lineage and unorthodox career path have informed my educating role, and the objective is to not only extract learning for myself but also articulate coherently what it is that informs my teaching and how it can be used to develop others, a 'bottling' of techniques and approaches so that others may perhaps be inspired to reflect on what being a 'legal educator' actually means.

My public works do not just focus on the more traditional academic teaching, but also reflect and illustrate my work as a consultant and 'legal trainer' to varied audiences including the Malawian Ministry of Justice, students of law, and the senior Judiciary of Kazakhstan.

Overview of the Chosen Works:

Malawi

As a legal intern for the Ministry of Justice in Malawi, I designed, developed and implemented a computerised database tracking system for methodically capturing and maintaining legal case files on over 30 homicide/death row cases, a system which 10 years later is still in place and has saved numerous human-hours and prevented the waste of precious resources for the Malawi defence lawyers. It has more significantly,

resulted in the successful release of a number of capital offence death row prisoners wrongly arrested and imprisoned. The significant public impact here, as I will illustrate in due course, is that not only did I facilitate the release of these prisoners, but ultimately played a small part in the Malawian abolition of the mandatory death penalty. I am proud to say that the authoritative arguments I put forward to the Malawian Director of Public Prosecutions were given, as Freire puts it, "...on the side of freedom, not against it" (Freire, 1970, p.53).

Legal Education

At Middlesex University I have given a paper on ground-breaking methods of teaching law to non-law students and also edited a text book for Pearson Publishers on 'Business Law' specifically designed and custom-edited for my students on the Business Law module.

In 2014/15 and 2015/16 and again in 2017 I have been nominated in virtually every category for the Middlesex University Student Union teaching awards including 'best feedback'; 'most empowering'; 'most inspiring' and 'most innovative'. I was also nominated by my Department in 2014/15 for the prestigious Oxford University Press Law Teacher of the Year awards and in 2016 was appointed as Head of Teaching and Learning for the School of Law and Politics. In April 2018, I am delighted to have won the award for 'Academic Staff Member of the Year for the School of Law' which recognises my pedagogical approach as being exemplary.

Authorship

As an academic author, I will demonstrate how my text books have been designed, written and published after extensive peer review and will include feedback from anonymous peers at various stages of publication, before and after the works were published resulting in public works which embody an extensive research and development process which has influenced both knowledge and practice. My pedagogical approach especially related to 'storytelling' will be illustrated here.

My text book, '*Land Law*' part of the new Blueprints series, was published in June 2014 after a two-year project to write the book in a pioneering innovative style which has

been widely acclaimed in its first year in the public domain. I will again aim to demonstrate the thinking and pedagogical approach that lies behind these works, especially once again, that which embraces storytelling as a method. As Blissenden suggests (2007, p.260) many students, [especially those at Middlesex University] “...come from a family background where a university education is unknown” and as such my use of the “...storytelling approach... can enrich the learning experience of students.”(p. 264) .My journal article *The Immigration Act 2014; ‘Not on the list you’re not coming in; Landlords forced to discriminate’* was published in the *Conveyancer and Property Lawyer* in 2015. I will demonstrate the tangible effect this article has had in influencing practice by way of brief reference to a particular case study where my article was cited academically to argue that landlords have been unfairly prejudiced by the inherently discriminatory nature of the legislation.

As I discuss earlier, what connects them all are values and ethics, with a strong drive towards acceptance of difference, making something out of what at first may appear almost inconsequential and helping people to reveal and develop their potential either as students or as practitioners. My earlier practitioner works aimed to leave a legacy, challenging the social, legal and political norms in the hope of making an impact, and I would argue they have influenced new policy initiatives and fundamental change, exploring, “...the real possibilities of human freedom” (Marcuse, 1969, p.105)

Public Works

1. A Report on the ‘Abuse of power, process and law; Malawi’; created and developed under the auspices of and published by the Criminal Bar Association [UK] (2004)

I have chosen the older public work (1) as it was seminal to my approach to my more contemporary works; it presented me with particular personal and professional challenges from which I learned about my own practice and the field of law; it confronted me with personal, professional, legal and political differences on a scale and intensity I had not experienced before and which I had to learn to navigate. The outcomes, products and impact from them still endure in the public domain.

Context - Malawi in 2003

In 1891, Malawi was proclaimed part of the ‘British Central Africa Protectorate’ and was known as Nyasaland from 1907 until Dr Hastings Banda’s ‘Malawi Congress Party’ swept to election victory in 1964 and with independence the country was re-named ‘Malawi’. My research was largely at the time thanks to the Centre for Capital Punishment Studies, University of Westminster. Due to this colonial past, Malawi ‘inherited’ the English Legal System, which continued after independence. Dr Banda whole-heartedly adopted the English Legal System retaining and using to his full advantage the mandatory Death Penalty for murder and treason. In 1994, Banda buckled under popular pressure to hold elections and Bakili Muluzi succeeded him creating a fledgling multi-party democracy. Though President Muluzi introduced a moratorium, and although there had been no executions in the ten years prior to my arrival, the mandatory death penalty remained and was still very much colouring the entire criminal justice system. Finally, just a couple of months before I arrived, a new President, Bingu wa Mutharika, became the latest incumbent of State House, after being endorsed by Muluzi throughout the election process. At the time, it was uncertain as to whether the mandatory death penalty would, at one end of the spectrum of possibilities, be torn from its safely enshrined position within the Malawian Constitution, or at the opposite end, whether the new President would end the

moratorium altogether. In conversations I had with Ministry of Justice officials, it became clear that the Malawian Government was more than aware of the perception of the public in South Africa, in many ways Malawi looked on South Africa as a 'role model, that the rise in crime was in direct correlation with the abolition of the death penalty.

What *did* surface was evidence that Muluzi's government were implicated in the terrible famine of 2002, where stockpiles of maize were illegally exported for personal profit. The effect on the Criminal Justice System was, at the time I arrived, that due to the famine, there was a huge raft of 'maize murders' where farmers attacked and killed thieves caught attempting to steal maize from their gardens and fields, resulting in hundreds of farmers and their 'guards' being arrested, charged with murder and thrown into prison. Almost all of these were still 'on remand' years later. When this type of crime was added to the 'witchcraft' and alcohol related murders, it quickly became evident to me that the mandatory death penalty was still hanging like the sword of Damocles over the heads of prisoners accused and charged on either very dubious evidence or where they had a strongly arguable defence. My work was to try to expose just exactly how flawed the system was, and as such, how legally and constitutionally unsafe was the existence of the mandatory death sentence within such a system.

Method

I worked in Lilongwe, Malawi as a legal intern through a placement with the University of Westminster Centre for Capital Punishment Studies. I was fortunate to be sent to Malawi in the summer of 2004 between my two years at Law School at the Inns of Court School of Law. My first task was to make contact with the Ministry of Justice in Malawi, namely the head of the Department of Defence. I managed to have a number of telephone conversations with 'The Chief' as he was known in the Department, and we decided that the main remit was to firstly analyse all the case files and painstakingly search through these hand-written files to find and present flawed evidence to the Public Prosecutor. It proved to be relatively easy to get an audience with the DPP as he was actually the brother of the 'Chief'!

Secondly, the remit was to arrive in Malawi and begin to convert all of the files to more durable electronic files. The Report below details exactly how this was achieved, and the methods used.

Reflections on the resistance and challenges I faced

When I arrived, I found a legal system creaking under the pressure of a lack of funding, wasted resources and a distinct lack of a systematic approach to the work. One major problem was that there were a number of high level players with a vested interest in the failing system. Money was being siphoned away from the Criminal Justice System and used for Judges 'business trips' to South Africa to 'learn lessons' from a much more developed system. This meant that there was little if any money left over for trials. There seemed to be as Marx put it, "...new conditions of oppression, new forms of struggle in place of the old ones" (Marx and Engels, 1888, p.2) in modern Malawi. The profoundly cruel dictatorship under Banda had been replaced by a so-called fledgling democracy which was in itself corrupt and oppressive. I found myself tasked with, to a certain extent, the need to 'enlighten', certainly from a legal perspective., Drawing on the writings of Kant, Horkheimer says of enlightenment that it is, "...the human being's emergence from self-incurred minority. Minority is inability to make use of one's own understanding without direction from another." (Horkheimer and Adorno, 1944, p.63). Part of my remit as an intern was exactly that, to direct the Malawian lawyers towards a more comprehensive understanding of the English Legal System, the system which was supposedly being used in Malawi. To draw on Vygotsky, I needed to quickly and efficiently move their learning into the 'Zone of Proximal Development.' (Vygotsky, 1978).

My professional dilemmas and how they were managed

At the core of my remit in Malawi was to research, develop and create a Report for the Malawian Director of Public Prosecutions on the '*Abuse of power, process and Law*' within the Criminal Justice system in Malawi. This report was written under the

auspices of the Criminal Bar Association in the UK as a way of influencing opinion at the top level of Malawian government and to illustrate and expose the many shortcomings of a system which retained the death penalty whilst at the same time was suffering from incompetence at best, corruption and bribery of law-officials at worst.

The main challenge was to begin to address a lack of justice in real terms due to corruption, incompetence and a misunderstanding of criminal law and evidence. The main theme for me as a practitioner was working with and through difference. My family had suffered greatly from a colossal abuse of power, a failure and manipulation of the legal system in Germany and gross injustices perpetrated by more than financial corruption but a corruption of the soul. Faced with these personal and professional dilemmas I identified that it was vital for me to not take anything for granted but to begin by addressing any gap in knowledge which may be present, through genuine ignorance, or ignorance being used as an excuse for corrupt or inept practices. I now see this as perhaps a hole in the Vygotskian theory. Vygotsky, writing as he was mainly in relation to young children and their learning, clearly did not deal with this 'ignorance lacuna' borne out of deliberate corruption, a kind of Nelsonian blindness and a desire not to learn. What seemed like at times an insurmountable task would need to begin by engaging the major players in the Malawian legal system in a discussion where they would first need to "...cultivate their humanity... see themselves as not simply citizens of some local region or group but also, and above all, as human beings bound to all other human beings by ties of recognition and concern" (Nussbaum, 2003, p.270). It was clear that my work, in order to influence thinking and practice, would not just be based on legal education, but deeper discussions as to general perception of the enormity of the systemic problems, only then can heightened perception become "...the motivating force for liberating action" (Freire, 1970, p.23). One extremely uncomfortable discussion I had was with the Governor of the main prison in Lilongwe. I spent many weeks trying to locate a client-prisoner who, in my view, had been wrongly accused of murder. He had by all accounts spent almost two years languishing in the horrific conditions of the prison block. Eventually, I found him. He had been too weak to come forward when his name had been called during my many visits. Finally, he came to the gates supported by fellow inmates. He was suffering from anaemia and was gravely ill, that much was obvious even to the medically

untrained eye. The Governor had refused many times to have him taken to hospital, but after some forceful persuasion on my part he relented. Tragically my client died that night in the hospital as it was far too late to save him. However, his family found some solace in the fact that due to his 'release' he was able to be buried in the family plot, so important to the Malawian people, rather than be buried in the confines of the prison which would have been his fate without the intervention. Thinking in retrospect of the prison governor and of the vagaries of the corrupt system made up of many such individuals, I can now clearly identify with Friere's view of the individual oppressor "Discovering himself to be an oppressor may cause considerable anguish, but it does not necessarily lead to solidarity with the oppressed" (1970, p.23). In this particular instance, there was at least for a moment, solidarity.

The value and impact of my work

As stated by Sullivan and Tuana (2007), this epistemology of ignorance was not just a simple gap in knowledge but seemed to be "...actively produced for purposes of domination and exploitation" (p.64). This was certainly true under the dictator Banda whose laws had simply not been repealed in 21st century Malawi. I used my research and knowledge by starting to explain to the legal team how law and evidence should be applied, especially within a system where the death penalty was a distinctly possible sanction. My report, attached as Appendix i) illustrates that this public work has had a profound impact and gives a valuable insight into process and skills which can transform research into useful outputs which influence thinking, action and practice. Due in no small part to the report I left behind, attitudes did begin to change. In just a few months whilst I was there, the impact of my work was that it resulted in 6 prisoners wrongly accused of murder being released from death row and in 2007, just three years after I left, it has been the source of great pride that I played a role in Malawi finally abolishing the mandatory death penalty. In *Kafantayeni v AG of Malawi* (Constitutional Case No.12 of 2005) the mandatory death penalty was finally held by the High Court of Malawi as unconstitutional. This was approved by the Malawian Court of Appeal in *Jacob v Republic* (Crim App No 16 of 2006) As suggested by Nicolini (2015), practice theory or practical wisdom creates a 'phronesis' – a so-called "...quality of mind that refers to practical wisdom whose aim is to produce

action...informed by purposeful and value-driven deliberations” (p.270). It was my attempt to create such an Aristotelian ‘phronesis’ which seemed to make the difference and to be exactly what this ailing system needed. My role here was to act as a ‘hermeneut’ (Maguire, 2015), to facilitate understanding, and in so doing I was able to help them interpret the texts of the recent legislation and case law and develop their understanding of the “...problems that arise when dealing with meaningful human actions and the product of such actions” (Mantzavinos, 2016, p47)

Summary and critical reflection

Looking back now I was unbelievably fortunate to have been given the opportunity to see at first hand many of the themes which had been prevalent in my early years. I mention in my report that my experiences in the hell-hole prisons of Malawi were not a million miles away from what I had always imagined the death camps of Auschwitz and Treblinka to be like. As stated above, it was not until April 2017 that I saw evidence of this first-hand during my visit to Auschwitz-Birkenau whilst walking through the prison-blocks and the remaining gas chamber.

In Malawi I encountered the most stomach-churning injustice, emaciated prisoners, disease and inhumanity by man to his fellow man and turn to Horkheimer and Adorno’s haunting words when I have lost mine in those memories: “...prisoners...are mere invalids, and the punishment meted out to them is blind, an alien event, a misfortune like cancer or the collapse of a house. Imprisonment is a lingering illness. This is revealed by prisoners’ expressions, their cautious gait, their circumstantial way of thinking. Like the sick, they can talk only of their sickness” (1944, p.188). I never expected to find myself in a position where I could make such a difference in such a short time. Being solely responsible for being able to advocate and secure the release of wrongly-accused death-row prisoners, including a young woman and her prison-born toddler, was the ultimate illustration of the notion of going far beyond mere survival. Leaving a legacy behind me of not just a methodical process to help such prisoners, but also to have worked to change a mindset which was almost enshrined at the heart of the Malawian criminal justice system was a privilege.

On reflection, what I now realise in relation to my work in Malawi is that there was a lack of 'translator' in this field and as such I needed to be "...lawyer as translator" (Cunningham, 1992, p.1299) in this particular climate of legal change. Cunningham, in relation to the practitioner-lawyer, suggests that a good translator will empower the client and good translation is an "art and ethic...a methodology drawn from anthropology and sociolinguistics...the ethnography of legal discourse" (1992, p.1301). Reflecting now, it seems that yet another thread of continuity was beginning to appear, that of the educator not just as teacher but as translator and storyteller. By using case studies, I was able to use as Menkel-Meadow (2000, p.787) illustrates "...stories to teach legal ethics" and explain exactly how the law works in practice. It seemed that their gap in knowledge was also simply a lack of understanding, and by focussing on this 'zone of proximal development' as Vygotsky advocated, I was able to leave them with training programmes in place to deal with these shortcomings. Many years later, the impact of my work is still tangible, especially the fact that death penalty for murder is no longer mandatory.

Impact this has had on my teaching and future works

The process of going back over time has surfaced new learning for me through a process of re-contextualisation which is, according to Linell (1998) referring to it as based on text, and transfer and transformational process of something. It is also about taking experiences and learning from one context and time into another making it relevant through repurposing it. I have though this process seen that my use of this experience in my teaching contributes to dissolving or recalibrating not only perceptions of difference but challenging archetypes and stereotypes which in turn inform expectations of each other. My experiences in Malawi translate to my diverse students that I am not a metaphoric islander, that I may not live where they have lived but I am aware of the historical and contemporary realities of the world they have inherited and have met them first hand; that there is a basis for trust between us. For the first time in my life, in Malawi I experienced an enactment of my values which till then had only been words felt deeply but never tested. I can integrate them now into my professional practice. I feel confident that my approach to helping the students to

integrate the 'reflected on' personal into the professional is sound. The learning I took with me from the Malawi experience is that

- all research should have an impact of some kind
- confidence is developed the more one has a positive impact
- agency in the world needs confidence building
- it is important to people to know they are of use in the world and can make an impact on it
- the role of context in making decisions and formulating plans
- thinking pain is universal is not the same as witnessing it
- there are many dimensions to ignorance
- the rule of law has to not only be devised but also have processes for its ethical implementation
- injustice is also about not knowing

This list itself would contribute to curriculum in teaching law whether the student is going to become a lawyer or whether it is a foundational subject for other careers. My experiences in Malawi critiqued and re-contextualised enables me to be, as Thompson (2017, p.16) points out "...more articulate and capable of perceiving differences (and thus meaning)". My students come from everywhere many of them with hidden stories. My heritage is that in which difference mattered in an extremely negative way. Malawi helped me to see inhumanity on a scale that is both small and large all over the world in civilised and developing communities. More than ever what I do in the classroom through storytelling and metaphors to complement the law content facilitates not just an understanding of the law but social understanding between differences of ethnicity, race, gender and status and the possibilities of reciprocity in friendship and knowledge. Therefore, tasks focused on collaborative case solving and presentations for me need to be part of the pedagogy for teaching law as Fitzgerald (2008) clearly stated in her doctoral research based on studies in the United States, "...the law school curriculum is based on an epistemology of objectivism that makes learning law difficult...[which] causes many students to feel isolated, disoriented, disengaged, and ultimately resigned to having no control." (2008, p.60). After my months of researching my own works and repositioning the learning in current contexts, I have come to see my pedagogic style as having been illuminated through the lenses of critical theory and

social constructivism, based not on the “...position of external boss or dictator but [as] a leader of group activities” (Dewey, 1938, p.59) which allows for the educative experience to be seen as a social process and my early work in Malawi has fed directly into this pedagogic process.

Malawi; the second limb; *The use of technology as an educational tool*

As the second part of my remit, I was tasked with the creation of what became *The Database for Case Management; Ministry of Justice; Lilongwe, Malawi (2004)*. I created this in July – September 2004, and it was then put into practice by the Department of Criminal Defence, Lilongwe from September 2004. It is used to the present day.

Figure 2. Excerpt from Database created in 2004:

<u>HOMICIDE CASES - OVERVIEW</u>					
REPUBLIC-v-	DATE OF OFFENCE/ ARREST	OFFENCE	PRISON/ DISTRICT	Instructions Y / N	MISC. INFO.
FILE No. File Opened On: Ref No.					
LL CR 44 04					Denies murder, admits assault – maize.
05/03/04					Issue - causation
DZ/CR/117/2/2002	23/02/2002	Murder	MAULA	YES	
LL CR 22 04					Grandmother – victim
11/02/04					Stone thrown
KU /CR/49/9/2002	08/09/2002	M'slaughter	KASUNGU	NO	Provocation

Context

When I arrived in Malawi I found that the publicly funded defence barristers working as part of the Ministry of Justice numbered only 6 for a population of roughly 10 million, and with a soaring crime rate, especially homicide. My first task in the development of this public work was to call meetings with the legal team to ascertain the depth of the problem related to the current paper-based system. It was decided that what was needed was a wholesale replacement of the hand-written files.

Reflections on the resistance and challenges I faced

The main issue seemed very obvious. When a trial was about to happen, the lawyers at the Department would sift through a pile of decaying files sat in the corner of a dusty office or perhaps on a shelf or in a cupboard. These files were problematic for two reasons. Firstly, they were largely illegible written in scrawled handwriting often by police officers who once again had a vested interest not to allow these files to be easily read. Secondly, they had been there so long in such dry dusty conditions that the paper would literally disintegrate when touched. This resulted in whole files 'disappearing' and with them, and last vestige of hope that the accused would ever get to trial but would simply languish in a Malawian prison forgotten and without any record of his or her existence. The method here was therefore simple. It was to create a 'typed' e-file to replace what was left of the paper versions to allow access and legibility if and when a trial would go ahead. Blissenden suggests, though specifically related to student learning rather than the professional practitioner, there is a need to "...tap into technology as part of engaging students with their active learning." (2016, p.127). In Malawi, within the Ministry of Defence, technology had never featured in legal practice. There were of course a number of reasons for this, mainly that the technology was simply at the time I was there in 2003, either ineffectual due to a lack of connectivity or non-existent due to a lack of hardware. Nevertheless, computers and laptops did exist, although rather antiquated even by 2003 standards. So there seemed to be no good reason to pass up the opportunity to firstly create a client database on my own laptop, but also to then train the lawyers and paralegals how to use it and maintain it in the future. I was aware however, that technology for technology's sake would be pointless and agree with Blissenden's point that "There needs to be a connection between technology, the expectation of being able to access

educational material at a convenient time, and the ability to link the educational material to a sound pedagogical learning environment” (2016, p.128) and as such I set about creating the database whilst at the same time explaining to my practitioner-students how this use of technology could positively impact their work by keeping accurate and non-destructible records to enable trials to be facilitated more effectively. It is always necessary to support the users “...to ensure that they are also able to move with confidence into this brave new world...” (Blissenden p.135) utilising technology. This was especially true in Malawi in 2003.

The original client database was paper-based; hard copy, scrawled often illegibly on scraps of paper and ‘filed’. As some of these files, literally crumbled to dust when handled and vital information was lost, a major part of my remit was to create this computerised database system so that the lawyers could track clients and if necessary quickly and effortlessly locate client information when cases were listed to appear in court. It also meant that the printed word could be read more easily, and hence spurious evidence could be spotted and challenged more effectively. My database legacy resulted in 6 prisoners being released while I was in Malawi and numerous others in years to come. I had always subscribed to the ‘Blackstone formulation’ that it is better that ten guilty persons escape than one innocent suffer and it was a ‘mitzvah’ to be able to put this deep-rooted value into practice. The Hebrew word ‘Mitzvah’ technically means ‘a commandment’ – meaning that it refers to any of the 613 commandments or precepts in the Hebrew Torah, but it also refers to the more general religious and moral conduct of Jews and good deeds emanating from that conduct.

The above seems common sense now and could raise the question as to how this is a public work as technology, even at the simplest level has transformed so many practices for the good. It would be the question I would ask. Malawi at that time was a chaotic and, in many ways, a depressing place. Good people were disempowered. It was not just about the technology, but persuading practitioners that it would work and making the connection between individual values, societal values and how something small could revolutionise their thinking and practices which would bring about the legal and social justice they knew the law could bring about, but it had been

paralysed by a corrupt at worst, inept at best, system. It could be done without a revolution in the name of freedom and justice that would usually end up as bloody and as brutal as the system one wished to overthrow or change. It was a matter of technology being mightier than the sword. To persuade I had to be myself. All public works are through the agency of the self in relation to self, to others and to society. In my role as an educator and as a barrister I am persuasive.

The value and impact of my work

In relation to my critical interrogation of this work, the process of creating the database as demonstrated in Figure 2 above, illustrates exactly why there was a need for action, and my development and ultimate delivery of the database for the Ministry of Justice in Malawi and continues to influence both knowledge and practice at the Ministry. The main professional theme here was an inherent lack of process and procedure, once again leading to an almost insurmountable injustice as there was a vital gap in the day to day running of a massively understaffed and under-resourced department. My public work here was a response to this problem. It is obvious now to me to articulate this as an episode of the Vygotskian 'zone of proximal development', and the challenge was two-fold. Firstly, the very poor connectivity meant that the internet was not particularly useful, and secondly that the paralegals had little if no previous understanding of using laptops and databases. As such the Vygotskian 'inner-circle' was poorly developed as a start point, so it was necessary for me to patiently start from scratch in the learning process. Many years later this process developed in Malawi, feeds directly into my pedagogy, as even in 2018 I come across students who have very little experience of technology. They are of course in the minority, but one example is as follows. Several weeks ago, I was giving lecture on how to use footnotes to illustrate and reference coursework. I wrongly took it for granted that all students' basic 'inner-circle' of knowledge included the ability to create a footnote on a word document. I realised that I was mistaken. By assuming that the basic skills across the cohort were broadly similar, it is far too easy to isolate individual students as recognised by Fitzgerald (2008) if the teacher is not "...attentive to students' overall experience" (Fitzgerald, 2008, p.67). Fitzgerald's recommendations echo the premise of this doctoral commentary, that "...each and every law professor question (if they

have not done so) their own fundamental theories about legal education and their personal role as teachers.” (p.82) and this should include the use of technology. It is also true though, as Maharg (2002), another key advocate of the use of technology, warns, is that the tail should not wag the dog. Technology should of course not dictate how or what we teach suggesting that “What happens then is that teachers turn into technicians” (Maharg and Muntjewerff, 2002, p.311). The authors draw on the work of Galton (2000, p. 203) who warns that “By making certain [teaching] techniques mandatory you run the danger of turning teachers into technicians who concentrate on the method and cease to concern themselves with ways that methods must be modified to take account of the needs of individual pupils...”. However, used thoughtfully, there can be no doubt of the value of technology in modern pedagogy and teachers need to become not only familiar with it but become more digital ‘native’ than ‘visitor’.

Summary and critical reflection

My Report highlighted the vast deficiencies and abuses of human rights and the database offered a way to manage and perhaps minimise such abuses in the future. The two projects were linked to ensure that on my departure there would be something of value for the communities. The lawyers had not resisted my efforts, in fact they had collaborated in helping its creation. It would have been a different story had there been resistance. On reflection, this secondary project was closely and inextricably linked to the first. I had learned that the system had been under-funded through ignorance and through corruption and a database would be the benchmark for fairness. Looking back, I did not really have a fully formed strategy perhaps because the funding was restricted and that I was not experienced enough in project management. If I had I would have found a way to teach more employees in the department, especially the paralegals, how to do the job. I had very little understanding at the time as to the various stakeholders, other than the people I was directly working alongside. On reflection, a better understanding of these stakeholders would have assisted me in building more of an infrastructure to support my work. For a number of years after I left Malawi

however, this close-knit community of paralegals and defence lawyers and I kept in contact, so I could see the impact of my work clearly.

When I first began the task of creating this database, it did seem to be something 'very little'. I am not in any way claiming to be a technical expert but through this 'specific opportunity to implement' the basic IT and organisational skills I did have had the effect of making a meaningful difference. Thompson (2017) echoes the view of Nicolini (2012, p.62) who suggested that an effective practitioner can create a 'toolkit' for effective organizational practice, that being able to 'bring it all together' for an organisation allows for a "connectedness of practices by patiently expanding the hermeneutic circle". As Marshall (2011, p.246) suggests, 'action research' can lead to a positive change in practice "...through reflection, identifying themes, issues and questions relevant to a broader community...". By explaining how to create and interpret the database to as many members of the department as possible, I was thankfully able to leave a working legacy that is still used by the Department to this day and has made a practical and telling difference to the lives of numerous prisoners.

Impact this has had on my teaching and future works

These ideas on practice theory and action learning are ones usually associated with organisations external to the university. I have now become interested in how action learning and practice theory can enhance learning for young people in higher education for example in collaborative learning in small groups in which knowledge can be co-created by the group on particular issues and then archived for others to use.

One very simple lesson in relation to my role as a legal educator which has resonated through the years after, is that technology can empower disenfranchised individuals and communities and give them not only a voice but a benchmark for action. It is challenging to know if you have improved or how you can improve if there is no baseline. The technology also has to work. If Malawi's technology breaks down, then it would not take long for the good practices to slip back into old practices in the absence of the technology which has helped to create and maintain the benchmark.

Higher education institutes are no less vulnerable. If we have overseas students and the delivery is on line for example, the technology becomes part of the delivery. If the technology fails or is sporadic this has a negative impact on the quality of the teaching and learning. I believe classroom work like action learning sets and collaborative projects need have a role to play in complementing on line delivery. work. We can 'think' and 'desire' innovation but in many instances, in the practical implementation of it, there are many obstacles and considerations which are the subject of several debates from diversion from educational instruction West and Bleiberg (2013, p.11) to technology dictating pedagogy (Galton (2000), Maharg and Muntjewerff (2002). For my part, I utilise technology as much as possible to design, create and present my materials which is not where the learning takes place. It is in dialogues with the students, they with each other, and with the materials. "Modern technology [allows for] a range of opportunities and tools for creating, learning, teaching, and sharing knowledge in engaging ways and through innovative formats" (Blissenden, 2016, p. 127).

It could be suggested that this early Public Work was my initial foray into what I now see as Transdisciplinarity as "...a way to arrive at 'metanoia', another way of knowing" (Maguire, 2015, p.165) and as Montuori (2008, p.151) puts it, "...a new way of thinking about, and engaging in, inquiry". Bernstein (2015, p.141) suggests that this approach engenders a climate of "...furthering knowledge". Looking critically at my role as legal educator, I strive each summer to find new and innovative ways to teach my students, ways that perhaps have, to this point, sub-consciously been aimed at "...transcending the established framework of traditional academic disciplines..." (Bernstein, 2015, p.28). As I now begin to move towards my more recent and pedagogical works, I will aim to illustrate how this approach seems to become more palpable.

There is always learning for the legal practitioner not only to be a better lawyer but to be open to the challenges which exist across the whole of society and which can develop the practitioner as a person. Law is too often thought of as the translation of rules and regulation but the quality of the interpretation of justice rather than the letter of the law is embedded in the person of the practitioner. I strive to embed in my students a sense of the 'why', a more jurisprudential approach to try to discover why the law is what it is. I have always firmly believed that it helps students to understand

the *ratio decidendi*, the legal reasoning of a case if they have an explanation of why the law was needed in the first place; what mischief the law was attempting to address. Even though jurisprudence is not formally taught until Year 2 on our LLB, I work hard to 'translate' for my students the history and development of the interpretation of justice from Bentham (1789) and Rawls (1971) to the liberality of Hart (1961). Without this 'translation', or what Bohler-Muller refers to as 'narrative jurisprudence' it is my belief, that "The foundational principle of law, namely the question of *how* to live, is never addressed. This is a travesty and could lead to law schools producing the type of lawyer described by Frederich Nietzsche as "...a filing clerk, a dust bug". (Bohler-Muller, 2007, p. 56).

2. Teaching Law – an innovative approach’ leading to my first Text Book ‘Business Law’ - Pearson Publications (2011); humour and storytelling

To set the context, Middlesex University (originally Middlesex Polytechnic) has one of the most diverse student profiles in the UK. The University (2017) states that “...we are committed to being an inclusive and diverse place to study, work and live” and as such there are significant challenges when teaching students from a multitude of backgrounds, cultures, languages, races and religions. One of the recurring themes in my paper is working with and through difference and Middlesex provides the perfect backdrop for me to try to achieve this. This is also true in relation to my second theme, - the desire to reveal and develop potential rather than just to survive and to inspire others to learn from not only a communal past, but from one’s own lineage and heritage. On a daily basis, the hunger to inspire feeds my pedagogy and drives me to be creative, innovative and inspirational. However, when teaching law to law students the challenge is not quite so tangible as when teaching non-law students.

Reflections on the resistance and challenges I faced

Within Middlesex University I have for a number of years been faced with the challenge, as have my peers across the country in their own Universities, of teaching law to non-law, business-oriented students, in a module entitled ‘Law for Business’ which is a core module for Year 2 Accounting and Finance students. This presents a range of challenges not least how to engage these students when their first thought on Day 1 is often ‘why do we need to learn law’. When I inherited the module at Middlesex, the pass rate after the main first-sit exam was only 50%.

To find a way to resolve this issue I embarked on an exploration of the views of the main stakeholders including past lecturers and the programme leaders, external examiners from all over the country, as the issue is a generic one, and to non-law students. This is another example of the collaborative approach referred to earlier in this commentary.

I then embarked on an innovative teaching approach which resulted in an equivalent increased pass rate of 80%. In 2009, I gave a paper on this innovative approach at an internal conference and in 2011, which I do not include as one of my public works, but argue that the thinking behind this and the theoretical approach utilised resulted in my first publication, a new textbook especially with these students at the forefront of my mind, and this chapter outlines the working process and delivery of both of these as I begin to focus on the more pedagogic side of my work.

The learning from the previous public works and how that learning was taken and demonstrated in this public works; humour and storytelling

As a legal educator I had always set out to challenge the paradigms of accepted teaching practice. I remember very clearly an early conflict with a colleague at Middlesex University. I had just been 'peer-appraised' by my colleague who was generally very constructive in relation to my teaching style and content. However, she also made a comment that the students seemed to be enjoying the lecture immensely. I realised very quickly that this was far from a positive comment from her perspective. She made it very clear that her view was that 'students were not here to enjoy themselves' and that we, as lecturers, are not there 'to entertain'. I made it abundantly clear that I fundamentally disagreed and that my style was such that it would engage inspire and inform all at the same time. In her view, it certainly seemed to me at the time, students were there purely to 'survive' university life and pass the examinations, full stop. As I have shown from the outset, my mission was always to go far beyond 'mere survival' to act as an agent in the service of change in others, to help students reveal and develop their full potential and at times the personal circumstances of students as well as the attitudes of teachers can prevent that. It is perhaps appropriate to cite Fitzgerald's research at this point. The author gives feedback from a student interviewed for her doctoral study and this resonates powerfully with me. Fitzgerald (2008, p.68) explains that *"As one student explained, the professors "came in, they lectured on the material, some would ask questions, some wouldn't...they would have no idea who anyone in the class was...they would have no interaction."*

Offer *et al* (2017) refer to a study which concluded among other things that in Australian law schools, students are prone to depression due to "...heavy workloads,

the tendency for law to attract competitive students, the adversarial nature of the discipline, the traditionally Socratic nature of law teaching, and the often highly competitive and largely unsupportive culture of law school” (p.3). Advocating the use of interaction and humour as a pedagogic approach they draw on the work of Wanzer and Frymier (1999) who state that “...[h]umor is an important instructional tool” and the benefits of incorporating humour into the teaching of law are many and varied: humour in the classroom can encourage attendance and involvement, alleviate the strain of learning a difficult subject and make the law school classroom a more enjoyable place to be”. It is of course true to state, as Offer *et al* do, that too much or inappropriate humour can distract and even alienate, but in my experience, used carefully, it is undoubtedly a tool I employ to great effect. The feedback from my students below illustrates this point further.

In my very first law class at the end of my first-year undergraduate degree, my law professor explained that he used the ‘Socratic Method’. This is a dialogic method where the questions drill down to the bones of anything. The teacher does not *necessarily* criticise but in fact just keeps asking questions on the answers to the questions. This encourages students to “...think out loud...” and where the “...teacher immediately intervenes to question and criticise” (Kearney and Beazley, 1991, p.101). I recognised that executed with care and compassion this method allows for a two-way process which can prompt the students to formulate their thoughts precisely and without the fear of making a mistake. However, used incorrectly or used to justify the ‘boss or dictator’ position as illustrated by Dewey (1938, p.59) this approach can have an extremely negative effect. Fitzgerald again cites student feedback: “...*a couple of professors used the so-called Socratic Method. This method was best described by one student as, "picking out names alphabetically, introducing a case and then saying, who's going to tell us what this is about, and then say, okay, what is the ratio in this case?" ...Students did not like the question and answer period or the Socratic Method...*” (Fitzgerald, 2008, p.66) The author also points to feedback stating that the students “...*felt uncomfortable...disliked being called on in front of their peers, usually for fear of looking stupid. One described it as scary...the professors were asking questions to check up on students or scare students, not to stimulate any thinking... it caused too much stress.*” (p.68)

Another common complaint illustrated by Fitzgerald is that lectures fail to engage the students and my pedagogic style incorporating humour and storytelling seems to combat this common criticism. The feedback below seems to suggest that student engagement is a major positive outcome of my style. I have been challenged a number of times as to making my lectures interactive rather than simply standing at the front of the lecture theatre ranting incessantly for 90 minutes and preventing any 'unwanted interventions' from the student audience. This method was and still is especially effective with non-law students as they often have many 'simple' questions not posed by first year law students. I have been told in both formal and informal feedback that one of the strengths of my teaching technique is its interactive style, allowing students to speak when they feel the need. Fitzgerald again points to a lack of engagement as one of the key issues in education. The author states that "...disengagement is caused by many factors and particularly the lack of human connection in almost every educational practice, from teaching methods to assessment method" (2008, p.78). Returning again to Vygotsky, social constructivist theory would suggest that if educators take the time to 'know their audience' and try to understand the level of knowledge with which they arrive, the students will be seen as individuals rather than just a 'sea of faces'. As Fitzgerald suggests, I am also aware of student comments about feeling anonymous, not valued and invisible. It seems all too obvious to suggest that we as educators should at least attempt to know the names of our students, but without this basic philosophy and practice students clearly fail to see themselves as "...critical co-investigators in dialogue with their teacher" (Freire, 1970, p.54)

In relation to perfecting a pedagogic technique or approach, from an early United States perspective in the early 1950's Professor Stansbury (1951) suggested that technique in relation to being a legal educator is vitally important as he states that the "...inescapable truth is that both ideas **and** technique are essential" (1951, p.24). However, it would seem that especially in the UK "...it was not considered quite nice for a law teacher to say anything about the way he taught..." (1951, p.1). Again, historically, it was perhaps, amongst others, the introduction of the Journal of Legal Education in 1948 which marked a "...final and general acceptance of the new philosophy" that talking and writing about teaching methods could only add value to pedagogy (Stansbury, 1951, p.25). As such part of the remit of this paper is to attempt a 'bottling' of my techniques and approaches so that others may perhaps be inspired

to reflect on what being a 'legal educator' actually means. Stansbury advocated just such a healthy discourse "...in talking about teaching methods" as he maintains that it can only be a positive step to "...utilise and transmit wisdom that we have acquired from others..." as "...every teacher has been a student of other teachers" (1951, p.24). In recent decades leading academics such as Moon (2000); Cowan (2006); Brockbank and McGill (2007); McPeake (2007); Fitzgerald (2008); Maharg (2014); and in Australia, Blissenden (2010); have all played a major role in developing this 'healthy discourse'.

Though my interactive method seems to suit my style intuitively, it has to be said that my very first experience sitting in a law class embedded this approach from day 1. It has never been my approach to see the student as a distraction, or to see a lecture as an opportunity to display my knowledge or my extensive memory of cases and facts. It has always been my approach to use my technique to explain, to inform, to educate and to inspire. From the moment I began teaching, my grandfather's mantra of the value of learning one new fact a day has been one of the many influences which has shaped my professional practice. I genuinely take enormous pleasure from seeing the 'light come on' in the faces of my students when they learn and digest something for the very first time. A while ago, I sat and watched the movie 'E.T' at home with my daughter which for her, was the first time she had seen the Spielberg classic. The look on her face is exactly the look I strive for in the faces of my students when I teach. If I can achieve that, the process is effective and the outcome extremely gratifying. For me, it is not just about students surviving their way through a lecture. It is vital to engage and engross the student. Engagement, interaction and humour are vital tools, but in my view, and it seems in the eyes of my students, storytelling is my most effective device.

Critical Reflection: Storytelling

Critically reflecting on my teaching style, I discovered that historically in Jewish tradition the '*drut'syla*' (from the Yiddish word '*dertseyler*') was a storyteller 'trained' in a "...a complex system of oral memorisation, visualisation and interpretation (midrash) of tales..." The *drut'syla* would then "...act as hereditary storyteller-in-residence to her

own immediate community” (Heywood, 2014, p.2). *Midrash aggadah* can be described as “...an interpretive act...exploring questions of ethics or theology, or creating homilies and parables based on...text.” (MLJ, 2017, p.3). It is perhaps then not surprising that there is much of the ‘drut’syla’ in me, and given my early career as an actor, it certainly does come naturally and plays a major role in my pedagogic approach. I argue though, that by at least explaining the human background to the case law, rather than just following the more traditional ‘case method’ of teaching which generally involves naming the case and giving the point of law, removing the more ‘humanising’ elements, it is possible for any educator to be a storyteller.

In recent years especially, much has been written and discussed as to the role of storytelling in legal education. Where I also guest lecture on the Graduate Diploma in Law [GDL] at City University, entire conferences have been devoted to the discourse of the role of storytelling. The ‘2013 Applied Legal Storytelling Conference’, was entitled “Once Upon A Story” (City University, 2013) where one of the key speakers, a Professor of Law at William S. Boyd School of Law, University of Las Vegas, Las Vegas led a discussion entitled “Schemas and Stories: What Cognitive Science Might Tell Us about Stories as Worked Examples” (City University, 2013, p.4) Professor Pollman drew on the work of Jerome Bruner arguing that “...Stories are a “fundamental structure of human meaning—making.” (Bruner) As transformative instruments, stories lead us from the familiar to the unfamiliar” (p.4). These biennial conferences also take place in the United States, but in analysing each conference programme, it is evident that much of the discourse is aimed at the practitioner-lawyer rather than aimed at the legal educator in relation to using storytelling as part of their pedagogical basket. McPeake (2010, p.303) argues that there has traditionally been an “...absence of story-telling from legal education in England and Wales. This important aspect of persuasion is quite thoroughly considered in the academic and professional legal literature of the USA and Australia, for example, but has received very little attention in England”. However, McPeake’s article is also aimed at the practitioner - advocate, especially those working in front of a jury, stating that “Stories are important for advocates” (p.305) and though he rightly suggests that “...it is perfectly possible to incorporate elements of story-telling into an undergraduate programme, either in terms of its underlying theory, or through consideration and practice of its techniques” (p309.) This again is aimed at training the law student to use storytelling as a tool, rather than

training the educator to use narrative to educate the student. Turner *et al* (2015) also focus on the practical skills of the law student, drawing on the work of Maharg, to suggest that "...games, simulation and role play can be used from the first day of legal education" (2015, p. 3). The authors cite training in negotiation, mooting and client interviewing as vital skills, and point to a skill-based approach which includes the use of narrative. It is perhaps stating the obvious then, that well-trained and effective advocates must be able to weave a strong and persuasive narrative before a Judge and especially before a jury. McPeake (2010); Turner *et al* (2015) and the main keynote speakers in each Legal Storytelling Conference support that assertion. Judges, especially in the Court of Appeal or the Supreme Court are often expert storytellers. The perhaps incomparable Lord Denning was renowned for his narrative judgments. In many of his most celebrated cases Denning often sounded like a schoolteacher, with children sat before him for 'story-time'. It is not too far a stretch of the imagination to 'hear' him commence a judgment with the words 'if you are all sitting comfortably, I will begin...' One such example from his legal canon is the beginning of his judgment in the case of *Hinz v Berry* (1970) 2 QB 40. This is a tragic case where a husband was killed by a driver who lost control of his car. The fateful incident occurred in full view of his wife and with many of their children present, the majority of whom were horribly injured. Denning begins the Court of Appeal judgment as if to tell his audience a happy tale: "*It happened on April 19, 1964. It was bluebell time in Kent. Mr. and Mrs. Hinz had been married some 10 years, and they had four children, all aged nine and under...On this day they drove out in a Bedford Dormobile van from Tonbridge to Canvey Island. As they were coming back they turned into a lay-by at Thurnham to have a picnic tea. The husband, Mr. Hinz, was at the back of the Dormobile making the tea. Mrs. Hinz had taken Stephanie, her third child, aged three, across the road to pick bluebells on the opposite side...*". Only after lulling the 'audience' into a false sense of security, does Denning go on to paint the picture of death and destruction as Mr Berry ploughs his car into the family members: "*Mr. Hinz was frightfully injured and died a little later. Nearly all the children were hurt. Blood was streaming from their heads...*". It is clear from the outset in whose favour Denning is about to rule!

My assertion is therefore, that one of the most effective ways to start from day one to train our law students in the art of storytelling, is to lead from the front. I suggest that

using storytelling, in a Denning-like manner, when explaining the case law to the students is the most effective way of getting the students to engage, retain and learn. I argue they will then remember the 'stories' which will then not just help them to remember facts for the examinations, but it will also be etched into their psyche that such persuasive narrative technique can be put to good use in their lives as practitioners. The work of Bohler-Muller (2007, p.50) supports my assertion. She argues that "Storytelling will reintroduce to students a sense of singularity of stories and of their sometimes maddening irreducibility..." arguing that "...storytelling is an antidote to students' reliance on over-restrictive forms of legal positivism by which they mechanically memorise and regurgitate rules without understanding the purpose or context of the law" (p.51). Echoing the work of Fitzgerald (2008) Bohler-Muller suggests that educative storytelling might relieve boredom and alienation and as such engagement, retention of information and a feeling of belonging ensue. She suggests that "Stories thus perform multiple functions, allowing us to uncover a more layered and refracted reality than is immediately apparent in the stock stories of law and its systems." (p.58). These arguments are also the backbone of the work of Michael Blissenden, as illustrated earlier in this commentary. Drawing on the work of Le Brun and Johnstone (1994) Blissenden suggests that the traditional legal pedagogic approach is that the students "...read appellate judicial decisions from a designated casebook or a reported case digest and attempt to identify the legal principle arising from the decision (case method). The teacher then questions students..." (Blissenden, 2007, p.260). Blissenden argues that this traditional case-lecture method should be challenged as it "...does not appear to sit well with the general acceptance that students need to be actively engaged in the learning process rather than through passive learning" (p.262). Drawing on the work of Coulter and Michael (2007) Blissenden argues that one of the most effective approaches is for the educator to engage the students by telling their 'war stories', suggesting that "Storytelling in the classroom could come from the experiences of the teacher providing insight to law students as to the practical implications of acting like a lawyer" (p.262). I begin my lectures every new academic year using exactly this approach. My aim is to 'capture' the attention of my students from day one, enthusing them with my own war stories, and so regale them with stories of my murder cases in the at the Old Bailey; armed robbery and heroin importation cases at Snaresbrook Crown Court; immigration and asylum cases at the Tribunals and civil cases of landlord and tenant disputes and

contract claims. All of these not only seem to engage the students fully but allow them to understand how the legal system actually works. Most of all perhaps, is that my feedback is such that they look forward to coming to my lectures. One of my most cherished moments early in my teaching career at Middlesex was when, by his own admission, a usually disengaged student approached me after a lecture and said ‘Sir, you are the only reason I get out of bed on a Tuesday’. As Blissenden also points out, the storytelling method “...may enable students to appreciate an enriched case method, be engaged in the learning process and be part of leading the class discussion” (p.264). I have certainly found this to be accurate. It is perhaps the ‘storyteller’ in me which has led to positive results in both my lectures and my written materials. As illustrated earlier, my lineage, background and early aspirations and training as an actor have perhaps most powerfully shaped my teaching technique and practice. I find that the explanation of case law lends itself perfectly to storytelling, and though by no means do I perform a ‘stand-up’ routine when lecturing, I certainly utilise the humour (Ziv, 1988; Wanzer, and Frymier, 1999; Offer et al 2017) and often the stupidity of the ‘situations’ behind the case law to make the law ‘stick in the heads’ of my students. This was also evident in the wonderful feedback I received when shortlisted in 2016, 2017 for the ‘most innovative teaching’ category of the Middlesex University Student Union Teaching Awards. The comments were read out as follows:

"Elliot's Law of Contract lectures have been interesting, funny and the highlight of my first year of studying at Middlesex University. Elliot uses memorable and current examples that help me to remember cases and important facts - such as the Taylor Swift Clause! It's these small things that make his lectures interesting and makes it much easier for me to remember important things."

"Elliot has always been so enthusiastic when teaching Contract Law. In his lectures everyone is on top of the subject and listens to his talks. He never lets a lecture go down without a few laughs, especially when he changes his voice for different roles when explaining a case".

"Very interactive teacher who breaks down problems through daily life and allows us to make a firm understanding of the topic in the most hilarious ways. His seminars are interactive and enable everyone to ask question"

This was also reflected in my nomination in April 2017 and my winning the award in 2018, where similar themes seem to have emerged to demonstrate the impact on my teaching:

"Great lecturer, helpful, engaging, motivational. Nice guy makes an effort, best lecturer by far"

"He guides us(law students) throughout the year which helps us. He makes any lecture fun and exciting (makes us come in every lecture!). He inspires us by sharing his past experience in the law industry and makes us all feel better about ourselves!"

"He is the best lecturer ever! Everything makes sense when he teaches."

"Elliot is an extraordinary lecturer which (sic) teaching techniques encourages a student to learn and work harder to achieve a better grade."

"Teaches content in a concise and informative manner"

"Elliot makes lectures interesting which makes his students stay focused during the 1h and 30m of lecture time. His method of teaching makes students understand the topic very easily. He motivates us all to get good marks so we can achieve the best grades."

"Makes lectures extremely interesting and explains in further detail the law in a way that is easier to understand. "

Can you describe some of the ways that this individual uses exciting teaching practices to make sure that students are able to engage with the course content?

"Anecdotes, the way he speaks is not dull and boring. Engaging and teaches relevant content etc."

"Everything with a smile. He uses hand gestures and doesn't look down on us unlike other lecturers"

"His teaching is very easy to follow and uses humour throughout which makes it interesting and captivating. He also goes through subjects step by step, which is very useful especially in contract law. He is always willing to answer any questions and he has approachable personality."

"He makes sure everyone understands the topic and repeats if necessary "

"Elliot himself is extremely passionate about the law which reflects clearly during his lectures. He always has fun stories to tell from when he was a barrister which directly links into our studies. This helps us retain the knowledge he has given us."

"He himself is exciting- contract law is not exactly a fun topic- but everyone shows up for his lectures "

"He doesn't just read through a PowerPoint but he really describes and really enables students to understand the content of the PowerPoint"

"He makes his lectures interesting, making his students to stay focused and to understand the topic the students are being taught."

"Uses anecdotes and is very interactive. "

How does this individual display exceptional knowledge and understanding of their subject and enthuse you?

"He's just always enthusiastic and bright and happy which brings good positive vibes "

"He gives very insightful lectures and has exceptional talent of making confusing concepts easy to understand. He comes to university despite being unwell and I think that shows how dedicated he is."

"He knows everything about his subject and beyond. He is a real Inspiration "

"Elliot has always put his lectures on myunihub before the lecture, but his lectures always remain full. The reason for this is because of his love and passion for the subject which is reflected through his teaching."

"He knows every detail of every subject and teaches it in the clearest way possible"

"Through his humour "

"Every time we (the students) do not understand something, he would explain it in a different way and make us understand it. In these situations, he would make the lecture ""interactive, allowing his students to understand what he is trying to say."

To return to the United States for a moment, Shapiro (2016, p7) suggests that the art of storytelling enables the 'teller' to "...convey information in a cogent, persuasive way" using the same techniques that have "...guided great storytellers for thousands of years" This is echoed by Couch who suggests that "...everything a lawyer produces is a story" and that storytelling can "...make students more aware " of the various issues involved. (Couch, 2005, p3). Professor Slawson suggests that the 'human interest' stories inherent in the case law often result in the students having "...no trouble remembering the case" (2000, p345) especially where the protagonists are for example 'cruel and selfish', idiotic or just plainly unfortunate. When explaining the ratio of the infamous case of *Donoghue v Stevenson [1932] UKHL 100* the facts lend themselves beautifully to the telling of poor Mrs Donoghue who swallowed half a decomposed snail from inside a bottle of ginger beer. The reaction of the students is always one of sheer horror and disgust, and I make the most of this to embed the image in their minds! The case of *Morris v Murray [1991] 2 QB 6* is another favourite. I tell the 'story' exactly as follows;

'We have all been out for a nice evening with friends haven't we. Off we go to a restaurant or a pub, and we often drive there. It goes without saying that we should of course not drive home after having a few drinks. Morris and Murray were two friends who decided to go out for such a night to a local pub in Shoreham-by-Sea – I know it well, it's actually exactly where my sister lives – just a mile or so away from this very pub. Well, these two friends decided that they would go to the pub in Murray's little private plane – they FLEW there and landed in the small and private Shoreham Airport - across the road from the pub. Out they got and walked over to the pub where they spent the evening drinking whisky – EIGHTEEN whiskies to be precise! Now, if we do

go out and drive to a pub – what do you do if you have had too many drinks – you get a cab home or walk – you don't get back in your car and drive – AND YOU CERTAINLY DON'T GET BACK IN YOUR PLANE AND TRY TO FLY HOME – this is of course what these two idiots did. Not only that it was raining, hailing and a storm was blowing. They took off – the plane went up and BANG...it came straight back down again. Murray was killed. Morris was injured and then tried to sue Murray... he LOST!”

This method allows me to ‘perform’ the case right in front of their eyes and of course this ‘dark-humour’ plays a major role, as it helps to cement the images and the facts in their minds. I use this technique for virtually all major cases and have found over the years, the cases are right there on the students’ exam papers at the end of the year, often with the facts exactly as I have given them.

In relation to both my paper on teaching law to non-law students and to my custom-made text book designed specifically for my non-law students, clarity, the social constructivist method and the art of storytelling are key skills and devices which help to reveal and develop the potential of my students and to engage, educate and inform resulting in my students enjoying, not just enduring, my lectures.

3. Text book ‘Land Law – your Blueprint to learning’ – Pearson Publications (2014)

In 2012 I was approached by Pearson to write a new textbook on Land Law. This was going to form part of a new series of text books entitled ‘**Blueprints**’ with the aim of creating a textbook for students at all levels studying the complexities of Land Law. After a long and very technical project and extensive peer review, my text book was published in June 2014. This project, along with the peer review feedback, the book itself, and a review on YouTube by Phillip Taylor MBE, Head of Chambers at Richmond Green Chambers in London, demonstrates how this output is influencing knowledge and is seen as innovative and ground-breaking. After speaking at length to the relevant department heads and editors at Pearson, the ‘Vygotskian’ ‘gap in the market’ was identified in relation to law text books aimed at, and ‘speaking’ directly to students studying core modules on law LLB and post-graduate courses

The main issue seemed to be that law students were being given materials which helped them to learn the complex core law subjects but failed to help them as to **how** to learn effectively. My public work here was to develop, create and deliver the Land Law version of a brand-new series called ‘Blueprints’ available to law students at all levels all over the world. The feedback so far has been extremely positive, and my legacy here is that I have a contract to re-write and update this text each year until 2030.

The value of my research and the impact on my practice.

I am including here the introduction to my book in full, as it effectively explains the remit of the book and how it is intended that the book is written to help students not just ‘survive’ the learning of land law, but to engage with the subject, to understand it and to have it explained in a way that once again is engaging and inspiring. My aim was to write a text book on what is often seen as a ‘dry’ area of law in a way which used my narrative pedagogic technique. As Bohler-Muller (2007) explains, “Critical or narrative jurisprudence does not seek to replace the thinking subject with the legal person, but rather seeks to open minds (and hearts) to the realisation that the law is not a separate, coherent system or unified metanarrative which can be fully and readily

understood, but rather one part of the whole of our finite existence on this earth.” (p. 58)

Impact this has had on my teaching and future works

My remit, after talking at length with Pearson, was to write the book using the style and technique I use to actually teach the subject. As such, I wrote each chapter from memory sat at my laptop writing down my lectures/tutorials almost verbatim as they would be face-to-face if my students were sat in front of me. One of the most positive pieces of feedback I have received is from a particular student who sat with my book in front of her as I gave a one-hour tutorial on the ‘law of mortgages’. She came up to me at the end of the hour completely bemused as to how I managed to as she put it, ‘memorise the entire chapter’ of my book almost word-for-word. I explained to her that it was actually the other way around. I wrote the book from memorising my lecture/tutorial, so as such the book mirrors my lecture almost entirely.

Storytelling

I argue that the innovation in this work is in its pedagogical approach, embracing the storytelling which is central to my educative style and method. I include in the book some fictional stories created to illustrate the many complex legal points, and also some real-life examples of some of my experiences in relation to land and property law. This echoes my face-to-face technique which, as illustrated earlier, I find helps to embed various facts and images in the minds of the students. As explained above, in the text book as in my lectures, I often share with my students tales from either cases I have worked on in courts and tribunals or stories from real-life using my storytelling-technique as a teaching model to make each account vivid and memorable (Blissenden, 2010). This was a technique praised in the peer-review of the book;

"...I am tempted to say that generating enthusiasm amongst students for Land Law is an oxymoron. This is as an engaging read as any I have read. It is accessible and avoids needlessly complex sentence and grammatical structures. I am confident my students would engage with it as much as they engage with any Land Law narrative..."

I have also included here the transcript of the review on YouTube by Phillip Taylor MBE, Head of Chambers at Richmond Green Chambers in London, which once again praises many of the techniques employed in the book;

Figure 4.

“...Published on 5 May 2015
BOOK REVIEW

BLUEPRINTS: LAND LAW
Your plan for learning

By Elliot Schatzberger

PEARSON EDUCATION LIMITED
Always Learning

ISBN: 978 1 44790 494 6 (print)
978 1 44790 495 3 (PDF)
978 1 29201 514 9 (eText)

www.pearson.com

“A BRILLIANT MODERN APPROACH TO THE STUDY OF ENGLISH LAND LAW FOR 21st CENTURY LAWYERS

An appreciation by Phillip Taylor MBE and Elizabeth Taylor of Richmond Green Chambers

Any course of study for English Land (real property) can be easy or hard depending on whether you like the subject and understand the British political and legal systems.

Teaching the subject has often caused some problems for both tutor and student- mainly from those overseas learners who may not be as familiar with our system in the United Kingdom which can seem strange to those in other jurisdictions.

So, to the rescue comes Pearson’s “Blueprints” series and author Elliot Schatzberger has brought together an excellent learning programme in four parts. The sub-heading for the “Blueprints” series is explained as “your plan for learning” and that is exactly what you get!

The Pearson mission is “to help people make more of their lives through learning” and the way they achieve this aim is to combine innovative learning technology with trusted content and educational expertise. The end product is what they describe as providing “engaging and effective learning experiences that serve people wherever and whenever they are learning” so the titles are excellent in particular for the distance learner.

Pearson Education provides both digital learning tools and testing programmes with their curriculum materials which offers a fresh introduction to this substantive law area.

For those new to the “Blueprints” guides, they are visually designed to assist the acquisition of information giving answers to the most-asked questions including: what is the law and how is it applied; what problems does the law attempt to solve; what do we think about the law; how has the law become this way; what factors are shaping the law today; what do we need to know if we want to understand the subject; where do different points of the law overlap; and where can we find further information about a topic?

The answer to these and other questions are set out clearly in the book which is a boon to the modern law student seeking to build a solid understanding of the law of real property.

As Schatzberger says this area of law is often viewed with apprehension by learners but it is not a prerequisite to have expertise in history, politics and comparative constitutions. The beauty of this book is that you can find all you need as an undergraduate with the useful contemporary examples illustrating what you may see on the news, or read in newspapers.

And as Schatzberger also says, it is an exciting time to study land law with all the changes which are taking place in 2014 and 2015. Whilst this book is only a short introduction for what is a vast study area, Schatzberger fills the gaps which the learner may have with the study programme: the “Blueprint” series create the indispensable building blocks of the subject to give you, the reader, how each area of the law fits together in the big picture which is Land Law today.”

The learning from the previous public works and how that was demonstrated here

Once again, I was fortunate to be given such an opportunity to write this text book allowing me, especially in the early chapter on ‘study skills’ to try to ‘bottle’ some of my techniques and approaches so that others may perhaps be inspired to reflect on what being a ‘legal educator’ actually means. Consciously analysing my previous works, I was trying to ensure, in this my first major textbook, that I would not only ‘teach’ land law, but try to encourage, inspire and motivate, challenging myself to teach law differently (Bohler-Muller, 2017). I am including the chapter on study skills and Chapter 1 of my book in the appendices.

4. *'The Immigration Act 2014; 'Not on the list you're not coming in; Landlords forced to discriminate'* – published in the *Conveyancer and Property Lawyer* (2015)

Context

In this particular public works, I found once again an outlet to demonstrate that the personal cannot and should not be divorced from the social, professional, universal and political (Bruns, 1992). As a child of an immigrant father, and with my family history, the issues surrounding so-called 'border-control' were never far from the forefront of my consciousness. Whilst just out of law school I practised as an Immigration and Asylum advocate, defending clients from all over the globe against being returned to countries where they faced at best human rights abuses, at worst torture and murder. In 2014, Parliament enacted the latest Immigration Act which included duties and obligations on Private Residential Landlords to check the immigration status of their tenants. At the time of publication, my public work was the only academic article to critically analyse this piece of legislation which was referred to by the now Prime Minister Theresa May whilst in her capacity as Home Secretary as a deliberately 'hostile' piece of legislation. I have no direct evidence to suggest that my article has been referred to in Parliamentary debates, but I do assert that this article was the first published to focus on May's stated objective to create as she called it, a "hostile environment" for immigrants. It is interesting to see, in light of the recent Windrush scandal, that this phrase has now been widely quoted by shadow MP's such as Sir Keir Starmer and Polly McKenzie (Perkins and Quinn 2018).

The article and its aftermath demonstrate that my work is 'opinion-leading' and is an output that may influence thinking and practice in the future months. My article has been cited in a Sussex University PhD thesis by Southerden (2016) and another at the University of Huddersfield (2015) and published on Luba QC's 'Housing Law' practitioner website. (Luba QC, 2015)

The Vygotskian 'gap' here which my public work aimed to fill, was a complete lack of any academic articles written on this subject. There were blogs and summaries written

by various landlord and tenant organisations and also pressure groups such as Liberty, but after consulting with Professor Martin Dixon, the editor of the *Conveyancer*, my proposal for an academic article on this subject, the legal obligations on a landlord being just about to be rolled out nationally after a pilot in the West Midlands, was accepted for publication as the first on this controversial and potentially damaging change in the landlord/tenant landscape. There is no question that once again, my lineage, influences and motivations positioned my article, written as a response to what I saw as a xenophobic and potentially socially-damaging piece of legislation. The personal is political.

The value of my research and the impact on my practice.

This work, like my Blueprints textbook, has had a direct impact on my teaching. I have used the article in lectures and seminars not just in the more obvious Land Law lectures, but also more generally as an example of what I see as 'knee-jerk' politically motivated legislation at its worst. Between January and March each year I teach Landlord and Tenant law to a post-graduate Masters group of students at Cass Business School. I have made this topic, and as such my article, compulsory reading and the basis of a written coursework question. The objective is not only to teach the substantive elements of the law but to inspire students to think carefully about the current political agenda not just within the UK but world-wide. This has of course, resulted in some deeply animated discussions which have taken us from 'Brexit' to Trump, the French elections and North Korea. Dewey advocates, effective educative practice and pedagogy requires the educator to "...become intimately acquainted with the conditions of the local community, physical, historical, economic..." (Dewey, 1938, p.40) and I share this with the students to enable truly progressive education.

The learning from the previous public works and how that was demonstrated here

The positive feedback I received from my textbook certainly encouraged me to follow a similar style in my writing of what was my first academic article to be published. My objective, as with my textbook, was not just to write a substantive article on the

provisions of the Act but to also challenge the legislation by reflecting and hoping that others would reflect, on the 'bigger picture'. It was, looking back now, rather prescient in some ways. I concluded by stating that “...*there may well be “...outright discrimination against “foreigners” partly through ignorance and partly through an abundance of caution...”* ...*It seems entirely possible given the early indications, that the ‘right to check’ provisions proudly announced by Theresa May with the objective of creating a “really hostile environment for illegal migrants”, may well result in a descent into the “stinking gutter of xenophobia” (Schatzberger, 2015, p.12).* This was of course written before the Brexit referendum result, before the rise to the Presidency of Trump and his attempted travel bans, and before the ‘victory’ of Le Pen in the first round of the French elections. Reflecting on my public works, and the themes I have identified, such as humanity and difference, it is perhaps more evident than ever before that to educate, legal or otherwise, the personal is inextricably bound to the social, professional, universal and political. My next project also seemed to be set on an ever-increasing trajectory to connect the personal with those four realities.

5. *Kazakhstan Judicial Training* leading to a working document *Consultation Paper ‘The Role of Equity in English Law’; written for the Kazakhstan Supreme Court*

I am aware that a project which is still in its working stages cannot be taken fully into account, however, I include this as something which potentially has significant public impact. I have completed the Consultation Document as highlighted above and am proud to say that this document will be used as a major part of the training of the Kazakhstan judges to incorporate principles of Equity taken from English law into the new Kazakh legal system. It is yet to be published but was personally requested [and can be verified] by Judge Madiyar Balkan, a judge of the “...specialized judicial board of the Supreme Court” (Press Office, Supreme Court of Kazakhstan, 2016). This project, which I am set to repeat this summer with the next group of Kazakhstan judges and lawyers, allows me to once again put into practice my pedagogical approach to ensure the ‘students’ master both the law but also technique and broader concepts (Schon, 1983, p.29)

At the time of submitting the first draft, prior to the viva in May 2017, I was asked to prepare materials, videos and glossaries and then deliver two of the eight weeks of training in June/July 2017 on behalf of the Law Society to senior lawyers and judges from Kazakhstan who were in the process of setting up a new Supreme Court in their country following English Law. This was a wonderful opportunity to once again combine the personal, with the universal and political. Reflecting on my works so far, my objective was not just to teach the substantive law, but to ask the learned lawyers and judges themselves to reflect on what it is about themselves, their own culture, lineage, heritage and backgrounds that will inform their own practices. The remit of my task is taken from the Law Society briefing document and demonstrates how my next public work will be formulated and delivered:

Background

On 19 May 2015, through Presidential decree, President Nursultan Nazarbayev announced his plan to create the Astana International Financial Centre (AIFC) in order to “*achieve the improvement of local financial system, human and technological capital, and cementing Astana as the financial & logistics hub of the Eurasian region*”....

Set to officially launch in January 2018, the AIFC is expected to establish a legislative system based on the English Common Law framework, the establishment of an independent court with highly qualified international judges as well as an arbitration centre for commercial and civil cases. Some plans have already been put in place; for example, British retired judges with extensive experience in commercial and civil disputes were hired on a temporary basis until national expertise is developed.

In early 2016, the AIFC approached the Law Society through the Kazakhstan Embassy to discuss a potential training programme for judges and staff. The Law Society understands that Kazakhstan is committed to deliver a capacity building project that aims to institutionalise English Common Law principles, including judicial independence and the rule of law, within the AIFC Courts and Practices.

The Law Society was commissioned to design and deliver a training programme for a small team of Kazakhstan judges and specialists from the Kazakhstan judicial system to take place in the United Kingdom. Key priority areas have been identified, ranging from Basic Principles of the English Common Law system to court procedures and commercial law. The following areas were also identified and will be taught through academic and practical training:

- a. Legal English language skills (for communication in the courtroom, writing legal documents, drafting laws (judgments, orders, resolutions);
- b. Introduction to principles of the English Common Law System, court structure and principles of civil procedure;
- c. Case management and other matters related to Court administration that affect the judiciary;
- d. Principles governing judges (judicial independence, anti-corruption, etc.)
- e. Principles governing members of the legal profession in England and Wales (conflicts of interest, ethical obligations to clients, professional standards and ethics etc.)
- f. Introduction to ADR, specifically (international) arbitration and mediation;
- g. Review of case law in commercial disputes in civil litigation and arbitration;
- h. Enforcement of court decisions and arbitral awards;
- i. Commercial law, specifically commercial contracts, conclusion and termination of contracts; obligations, warranties and indemnities, responsibility and damages, financing and tax aspects specific to international contracts;
- j. Company law (non-profit incorporated organizations, joint ventures, joint-stock Companies, LLP etc.), partnerships, shareholder agreements, etc.;
- k. Civil law (property and corporeal rights, intellectual property etc.);
- l. Banking and finance law (loans, securities, financial transactions, etc.

Methodology

The European Judicial Training Network (EJTN) Handbook for Judicial Training Methodology in Europe and other adult-learning specialist institutions recommend that the role of the trainers for adult and professional learning should be to facilitate the professional development of judges through a hands-on, practical approach while demonstrating ***the relevance of the issues taught***. This training programme intends to adopt a participatory approach, which aims at increasing knowledge through practical exercises, discussions and observation that is:

- ☐ Learner-centred;
- ☐ Experienced based;
- ☐ Open-minded.

This training approach strives to build confidence among practitioners recognising and capitalising on existing expertise and experience while, at the same time, critically examining their own insights through their own judicial analysis in a safe environment, together with colleagues and other members of the legal profession. Therefore, this proposal uses different methodologies in order to improve skills and knowledge tailored to the needs of the participants as identified by the AIFC:

- a. **Learning by concrete experience** by using role play, snowballing, mooting, problemsolving exercises and case studies
 - i. *Increasing communication skills (verbal and non-verbal)* through practical techniques including the use of scenario and role play for diffusing highly charged situations in and out

of the court setting, such as ways of working with unrepresented litigants and managing all participants in litigation and/or arbitration proceedings.

- ii. *Using case studies and role play* to discuss differing approaches to Courtroom Management.
- b. **Learning through observation and reflection** through structured observation, debriefings, structured discussions after specific activities:
- i. *Court visits followed by debriefing sessions and discussions* relating to a particular case so as to expand thinking and to introduce different perspectives. Throughout the workshop participants constructively could reflect on their own and each other's approaches to judicial reasoning.
- c. **Learning by forming abstract concepts** through lectures and presentations combined with brainstorming, debates and group work
- i. *Face-to-face lectures on substantive law and practice* through seminars conducted at a law firm or academic institution throughout the year to refresh the participants' learning.
 - ii. *Face-to-face presentations and workshops on legal issues by Law Society members* on specific topics followed by a debate and group work.

Final Thoughts

It is my sincere belief that writing this doctorate as an attempt to articulate what feeds into my own pedagogy and philosophy of education, I have begun to discover what is transferable to others, not just in the lecture theatres and seminar rooms to fellow educators and students but on the wider stage.

I believe that this commentary has begun to identify the practice and philosophical notions around 'teacher as translator' across different realms of experience (Maguire, 2015). Different realms of experience can be extreme requiring increasingly skilled translators to bridge not only knowledge and economic gaps but humanity gaps. There are still many innocent people who continue to be tortured and annihilated with no signs of abatement. Recent events in Syria clearly illustrate that inhumanity is very much still a part of everyday life echoing the heinous crime against the Jewish people. My family story, and how that has informed my pedagogic career and Public Works so far, is not only how to survive, but over time and over generations to continue the work of translating across what divides those who have faced the worst of inhumanity and those who haven't.

When I first began to write this commentary, I was unconvinced to a certain extent that my family background, lineage, culture and heritage had such a direct effect on my role as an educator. This has been the first time in my professional career that I have been given an opportunity to 'sit back' and reflect on why I do what I do and how I do it. I have always believed that it 'just comes naturally' and to a point my personality, what is within, perhaps cannot be 'taught'. However, we can all 'look within' if we take the time and go through the sometimes-painful process of reflecting on what positions our story and what has driven us towards our "...specific vocation or mission in life..." and given us a "specific opportunity to implement it" (Frankl, 1992). The personal *is* the social, *is* the professional, *is* the universal and perhaps more than ever before, *is* the political.

There is one comment from a student of which I am particularly proud, and this one comment encapsulates all I strive to achieve and demonstrates what *can* be achieved as a legal educator: *"He guides us(law students) throughout the year which helps us. He makes*

lectures fun and exciting (makes us come in every lecture!). He inspires us by sharing his past experience...and makes us all feel better about ourselves!"

I hope to have begun to demonstrate that this manner of critical reflection can bridge the personal and professional, illuminating my teaching and my role as a legal educator. I hope that the two parts of this commentary have combined to illustrate the themes of values and ethics, acceptance of difference, making something out of what at first appears to be very little, and most importantly, helping people not just to survive but to reveal and develop their full potential.

"I think it would be ideal to have each and every law professor question (if they have not done so) their own fundamental theories about legal education and their personal role as teachers. By this I mean the, often unconscious, philosophies and worldviews that drive all that they do. Not just about education and learning but their role in the university, the legal profession and the world. If there are enough professors believing that they are critical to each and every law student's growth as a human being and that law students are fully developed and can create their own meaningful learning experience (e.g. light the flame, not fill the bucket), I think the world of legal education would be completely different... With a continual desire on the part of legal educators to improve the state of legal education I am hopeful that these suggestions will find fertile ground" (Fitzgerald, 2008, p.82)

Bibliography

Arendt, H (1971) 'Thinking', Volume 1 of 'The Life of the Mind', New York; Harcourt Brace Jovanovich

Bernstein, J (2015) 'Transdisciplinarity; A Review of Its Origins, Development, and Current Issues' Journal of Research Practice, Vol 11, Issue 1, Article R1, 2015
www.jrp.icaap.org

Bettelheim, B (1960) 'The Informed Heart' American Journal of Sociology, Volume 66, Number 6 | May, 1961 www.journals.uchicago.edu

Beech, N. (2011), "Liminality and the practices of identity reconstruction", *Human Relations* , Vol. 64 No. 2, pp. 285-302.

Bentham, J (1789) (1907). 'An Introduction to the Principles of Morals and Legislation'. Oxford: Clarendon Press.

Beyer, B. (1985). Critical thinking: what is it? Social Education, 49 (4), pp.270-276.

Blissenden, M (2010) Using storytelling as a teaching model in a law school: The experience in an Australian context, The Law Teacher, 41:3, 260-274, DOI: [10.1080/03069400.2007.9959747](https://doi.org/10.1080/03069400.2007.9959747)

Blissenden, M (2016) 'Law Student Learning, Storytelling and Student Device Initiatives', Athens Journal of Law July 2016 , Volume 2, No. 3 pp127-136
<https://www.athensjournals.gr/law/2016-2-3-1-Blissenden.pdf>

Bohler-Muller, N (2010) The challenges of teaching law differently: Tales of spiders, sawdust and sedition; The Law Teacher Volume 41, 2007 - Issue 1

Boulton, J, Allen, P and Bowman, C (2015) 'Embracing Complexity; Strategic Perspectives For An Age of Turbulence' Oxford University Press

Bower, B (1996) 'Trauma syndrome transverses generations', Science News, 149, (20), 310-311

Brockbank, A and McGill, I (2007) 'Facilitating Reflective Learning in Higher Education', 2nd Edition, Open University Press.

Bruns, G (1995) 'Hermeneutics Ancient and Modern' Yale Books, United States
www.yalebooks.co.uk

Burbules, N. and Berk., R. (1999). "Critical thinking and critical pedagogy: Relations, differences and limits". In Critical theories in education: Changing terrains of knowledge and politics, Edited by: Popkewitz, T. and Fendler, L. 45–65. New York: Routledge. [Google Scholar]

Campbell, J (1949) 'The Hero With A Thousand Faces'
www.ithacamyth.wordpress.com

City University (2013) 'The '2013 Applied Legal Storytelling Conference', "Once Upon A Story" City University 22nd – 24th July 2013, The City Law School City University London

Cole, M., & Scribner, S. (1978), 'Introduction'. In M. Cole, V. John-Steiner, S. Scribner, & E. Souberman (Eds.), Vygotsky, L. S., 'Mind in society: The development of higher psychological processes'; Cambridge, MA: Harvard University Press. .

Couch, C (2005) 'Teaching the Narrative Power of the Law' University of Virginia, Fall 2005 www.law.virginia.edu

Coulter, C and Michael, C (2007), "Storytelling as Pedagogy: An unexpected outcome of narrative inquiry". 37(2) Curriculum Inquiry 103-122.

Cowan, J. (2006) 'On Becoming an Innovative University Teacher: Reflection in Action: Reflection in Action' : 2nd edition, Open University Press 2006

Cowen, H (2003) 'The Significance of the Frankfurt School and Critical Theory'; University of Gloucestershire; 1 April 2003

Crenshaw, K (2017) 'On Intersectionality; Essential Writings' Indigo, CA
www.chapters.indigo.ca

Cunningham, C (1992) 'The Lawyer as Translator, Representation As Text; Towards an Ethnography of Legal Discourse' Cornell Law Review, Vol 77, Issue 6, September 1992, Article 4. www.scholarship.law.cornell.edu

Dewey, J (1938) 'Experience & Education' First Free Press Edition, 2015, Simon & Schuster, New York

Dewey, J (1916) *Democracy and Education: An Introduction to the Philosophy of Education* (New York, The Macmillan Company, 1916)

Davidson, C (1977) 'Left in Form, Right in Essence; A Critique of Contemporary Trotskyism' www.marxists.org

Eastman, E and Maguire K (2016) 'Critical autobiography in the professional doctorate: improving students' writing through the device of literature'; *Studies In Continuing Education* Vol. 38 , Iss. 3, 2016

Edwards, J. Adam and Hill, Vanessa (2016) *Demythologising librarianship: future librarians in a changing literacy landscape*. [Doctorate by Public Works]

Fitzgerald, M (2008) Rite of passage: The impact of teaching methods on first year law students, *The Law Teacher*, 42:1, 60-84, DOI: 10.1080/03069400.2008.9959762

Fogelman, E (1998) 'Survivor victims of war and Holocaust' In D. Levinton (Ed.), 'Horrendous death and health; Toward Action' (pp. 37-45) Washington DC; Hemisphere

Frankl, V (1992) 'Man's Search for Meaning' 4th Edition, Beacon Press,
www.sonoma.edu

Freire, P (1970) 'Pedagogy of the Oppressed' 2017 Edition, Penguin Classics, Great Britain

Galton, M (2000), "Big Change Questions: Should Pedagogical Change be Mandated? Dumbing Down on Classroom Standards: The Perils of a Technician's Approach to Pedagogy", *Journal of Educational Change*, Vol. 1, pp. 199-204.

Gay, G and Kirkland, K (2003) 'Developing Cultural Critical Consciousness and Self-Reflection in Preservice Teacher Education 'Theory Into Practice'', Volume 42, Number 3, Summer 2003, College of Education, The Ohio State University

Gibbs, P and Maguire, K (2016) 'The professional and personal values and their revelation through professional doctorates', *Higher Education, Skills and Work-Based Learning*, Vol. 6 ; Issue: 3, pp.237-248,

Gibbs, P (2017) 'Happiness in Higher Education' *Higher Education Quarterly*, Wiley Online Library, <https://doi.org/10.1111/hequ.12121>, 19 March 2017

Giroux, H (2011) 'On Critical Pedagogy'; Bloomsbury Press

Gray, B (1989) 'Collaborating: Finding Common Ground for Multiparty Problems', . San Francisco: Jossey-Bass.

Hadorn, G., Schmied, B. and Frischknecht, P (2011) 'Transdisciplinary elements in university education; the case of the environmental science programme at ETH Zurich' Hermann Editeurs

Hart, H.L.A. (1961) 'The Concept of Law' (Clarendon Law) (Clarendon Law Series) Amazon. Clarendon Law Series

Harbin, J and Humphrey, P (2010); Texas University 'Teaching Management by Telling Stories' *Academy of Educational Leadership Journal*

Heagney, M (2013) 'Lecturers Bring Special Expertise' www.law.uchicago.edu

Held, D (1980) 'Introduction to Critical Theory; Horkheimer to Habermas', Berkley, CA: University of California Press

Helmreich, W.B. (1992) 'Against all odds; Holocaust survivors and the successful lives they made in America' New York, Simon and Schuster

Heywood, Simon (2014) 'The Last 'Drut'syla' ?– A traditional Jewish Storyteller in Post-War Europe' The Warburg Institute, Woburn Square, London; www.folklore-society.com

Horkheimer, M (1937) 'Traditional and Critical Theory,' in *Critical Theory: Selected Essays*, (1968) pp. 188–243. M. O'Connell (ed.), New York: Continuum Press, 1999

Horkheimer, M (1937b) 'Authority and the Family' in *Critical Theory: Selected Essays*, (1968) pp. 47-129. M. O'Connell (ed.), New York: Continuum Press, 1999

Horkheimer, M. and T.W. Adorno (1944). *Dialectic of Enlightenment*, New York: Seabury.

Jacobs, H. (2008). Information literacy and reflective pedagogical praxis. *The Journal of Academic Librarianship*, 34 (3). pp.256-262.

James, N., Hughes, C and Cappa, C (2010) Conceptualising, developing and assessing critical thinking in law; Pages 285-297 | Published online: 14 Jun 2010

Jennings, D (2017) 'Education Theory; Constructivism and Social Constructivism' Open Educational Resources of UCD Teaching and Learning, University College Dublin,
http://www.ucdoer.ie/index.php/Education_Theory/Constructivism_and_Social_Constructivism

Jones, K; Misra, J and McCurley, K (2016) 'Intersectionality in Sociology' www.socwomen.org

Kafantayeni v AG of Malawi (Constitutional Case No.12 of 2005) 'The Death Penalty Project' www.deathpenaltyproject.org

Kaplan, Fara (2014) 'Holocaust Survivors and Their Children; A Search for Positive Effects' The American Academy of Experts In Traumatic Stress www.aaets.org

Kearney, M.K and Beazley, M.B (1991) 'Teaching Students how to 'Think Like Lawyers': Integrating Socratic Method' Temple Law Review; Temple of the Commonwealth System of Higher Education; Volume 64, No.4 Winter 1991 www.lwionline.org

Kelley, D and Gorham, J (1988) "Effects of Immediacy on Recall of Information" 37 Communication Education 198;

King, A (1993) 'From Sage on the Stage to Guide on the Side'; College Teaching Vol. 41, No. 1 (Winter, 1993), pp. 30-35 ; Taylor & Francis, Ltd.

Kolb, D. A. (1984). 'Experiential learning: Experience as the source of learning and development'. New Jersey: Prentice-Hall.

Kolb, D. A., Boyatis, R, Mainemelis, C (1999) 'Experiential Learning Theory: Previous Research and New Directions', Department of Organisational Behaviour Weatherhead School of Management, Case Western Reserve University, Cleveland, U.S.A. August 31, 1999

Klarsfeld, Serge (1983) 'Memorial to the Jews Deported from France 1942-1944' The Beate Klarsfeld Foundation, New York

Klein, P (2105) 'Those who can't do, teach? Think again' University of Columbia, The Globe and Mail June 5th 2015 www.theglobeandmail.com

Kouzes J.M., and Posner, B.Z. (2002) 'The leadership challenge' 3rd Edition, San Francisco; Jossey-Bass. 198

Lave, J and Wenger,E (1991) *Situated Learning: Legitimate Peripheral Participation* (CUP 1991);

Lazos, Sylvia R., "Critical Race Theory and Autobiography: Can A Popular Genre Make a Serious Academic Contribution?" (2000). Scholarly Works. Paper 490.
<http://scholars.law.unlv.edu/facpub/490>

Le Brun, M and Johnstone, R (1994), *The Quiet Revolution—Improving Student Learning in Law*, The Law Book Company Limited

Leventhal & Ontell (1989) 'A descriptive demographic and personality study of second-generation Jewish holocaust survivors' *Psychological Reports*, 64, (3), 1067-1074

Linell, P (1998) 'Approaching Dialogue: Talk, Interaction and Contexts in Dialogical Perspectives' John Benjamins Publishing Company www.benjamins.com

Luba, J, QC (2015) 'Housing Law Week; Lime Legal' ;14th October2015
<http://www.limelegal.co.uk/hlwemails/2015/hlw141015.html>

Maguire, K (2015) Transdisciplinarity – see 'Transdisciplinarity as Translation' in Paul Gibbs (Ed) *Transdisciplinary Professional Learning and Practice*, Springer 2015 p165-77

Maharg, P (2007) *Transforming Legal Education: Learning and Teaching Law in the Early Twenty-first Century* (Aldershot, Ashgate, 2007), p. 156

Maharg, P & Muntjewerff, A.J. (2002) Through a screen, darkly: Electronic legal education in Europe, *The Law Teacher*, 36:3, 307-332, DOI: 10.1080/03069400.2002.9993111

Mantzavinos, C (2016) 'Hermeneutics' *Stanford Encyclopaedia of Philosophy* www.plato.stanford.edu

Markless, S. (2004). Teaching your Users: What you Really Need to Know. *Legal Information Management*, 4 (4). pp.221-225.

Marshall, Judi (2011) 'Images of changing practice through reflective action research' Journal of organizational Change Management, Vol. 24 Issue 2
www.emeraldinsight.com

Marx, K and Engels, F (1888) 'The Communist Manifesto' Penguin Classics, 2015 edition. Random House, United Kingdom

McKinley, J (2015) 'Critical Argument and Writer Identity: Social Constructivism as a Theoretical Framework for EFL Academic Writing' Critical Inquiry in Language Studies, 12(3) 184-207, University of Bath (September 2015)

McPeake, R (2007) Fitting stories into professional legal education—the missing ingredient, The Law Teacher, 41:3, 303-313, DOI: 10.1080/03069400.2007.995975

Menkel-Meadow, C (2000) 'Telling Stories in School; Using Case Stories to Teach Legal Ethics' Fordham Law Review; 69 Fordham L.Rev. 787 (2000)

MJL Staff (2017) 'What is Midrash' My Jewish Learning,
<http://www.myjewishlearning.com/article/midrash-101/>

Mobbs, R (2018) 'How to be an e-tutor; David Kolb' University of Leicester, Doctoral College; <https://www2.le.ac.uk/departments/doctoralcollege/training/eresources/teaching/theories/kolb>

Moorhead, R (2016) 'Practical Changes to Legal Education in the UK' LexisNexis, October 13, 2016, <https://blogs.lexisnexis.co.uk/futureoflaw/2016/10/practical-changes-to-legal-education-in-the-uk/>

Moon, JA (2000) 'Reflection in Learning and Professional Development: Theory and Practice' New Edition, Routledge

Moore, A (2004) 'The Good Teacher: Dominant Discourses in Teacher Education', RoutledgeFalmer, London

Montiel-Overall, P. (2007). Information literacy: Toward a cultural model. Canadian Journal of information and Library Science, 31 (1) pp.43-68.

Montuori, A (2008) 'Transdisciplinarity: Theory and Practice (ppix-xvii) Cresskill NJ. Cited in Bernstein, J (2015) 'Transdisciplinarity; A Review of Its Origins, Development, and Current Issues' Journal of Research Practice, Vol 11, Issue 1, Article R1, 2015 www.jrp.icaap.org

Nicolini, Davide (2012) 'Practice Theory, Work & Organisation' Oxford University Press.

Nussbaum, M.C. (1986) 'The fragility of goodness; luck and ethics in Greek tragedy and philosophy' Cambridge University Press.

Nussbaum, M.C. (2003) 'Cultivating Humanity in Legal Education' (2003) 70 University of Chicago Law Review 265

Offer, K, Skead, N & Seen, A (2017) "You must be joking": the role of humour in the law classroom, The Law Teacher, DOI: [10.1080/03069400.2017.1379182](https://doi.org/10.1080/03069400.2017.1379182)

Perkins, A and Quinn, B (2018) 'May's immigration policy seen as 'almost reminiscent of Nazi Germany' The Guardian, Thu 19 Apr 2018, <https://www.theguardian.com/uk-news/2018/apr/19/theresa-may-immigration-policy-seen-as-almost-reminiscent-of-nazi-germany>

Petrovsky-Shtern, Y (2014) The Golden Age Shtetl, Princeton University Press, www.press.princeton.edu

Pfeiffer and Sutton (2006) 'Hard Facts; Dangerous half-truths & total nonsense; Profiting from evidence-based management' Boston MA; Harvard Business School Press

Press Office; Supreme Court of Kazakhstan (2016) 'In the Supreme Court is updated the staff of judges-coordinators on media relations'; Sat, 02/06/2016 - 16:25

<http://sud.gov.kz/eng/news/supreme-court-updated-staff-judges-coordinators-media-relations>

Rogers C. R. (1959). A theory of therapy, personality, and interpersonal relationships as developed in the client-centered framework. In Koch S. (Ed.), Psychology: A study of a science: Vol. 3. Formulations of the person and the social context (pp. 184-256). New York, NY: McGraw-Hill.

Rawls, J (1971). 'A theory of justice'. ISBN 0674000781. OCLC 41266156.

Roth, P (1986) 'A Conversation with Primo Levi' in Levi, P (1996) 'Survival in Auschwitz' New York, Simon & Schuster

Schon, D (1983) 'The Reflective Practitioner – How Professionals Think in Action' Basis Books, Inc, USA

Schwartz, M, Hess, G and Sparrow, S (2013) 'What the Best Law Teachers Do' Harvard University Press www.hup.harvard.edu

Shapiro, Jonathon (2016) 'Lawyers, Liars, and the Art of Storytelling; Using Stories to Advocate, Influence and Persuade' American Bar Association.

Shaw, G.B. (1903) 'Maxims for Revolutionaries' in 'Man and Superman' (1903);

Solicitors Regulation Authority (2015) 'Training for Tomorrow: assessing competence' 7 December 2015, <https://www.sra.org.uk/sra/consultations/t4t-assessing-competence.page>

Southerden, T (2016) "Lifting the Wire": Litigating for Migrants' Rights in the UK'; PhD Law Studies ;The University of Sussex ; September 2016
<http://sro.sussex.ac.uk/66838/1/Southerden%2C%20Tom.pdf>

Slawson, W.D. (2000) 'Changing How We Teach: A Critique of the Case Method' University of Southern California Law School' Southern California Law Review (2000) Vol 74:343-346

Stansbury, D (1951) 'On Teaching Law Teachers to Teach' Duke University, www.scholarship.law.duke.edu

Sullivan, S and Tuana, N (2007) 'Race and the Epistemologies of Ignorance' Suny Press

Thompson, M (2017) 'Similarity and Difference; The Shared ontology and diverse epistemologies of practice theory' citing ' Nicolini, D (2012) 'Practice Theory, Work & Organization: An Introduction' Oxford, Oxford University Press

K. Tokarz, A. Sedillo Lopez, P. Maisel and R. Seibel, "Legal Education at a Crossroads: Innovation, Integration, and Pluralism Required!" (2014) 43 *Washington University Journal of Law and Policy* 11, at p. 14.

Turner, J; Bone, A & Ashton, A (2016) Reasons why law students should have access to learning law through a skills-based approach, *The Law Teacher*, 52:1, 1-16, DOI: [10.1080/03069400.2016.1201739](https://doi.org/10.1080/03069400.2016.1201739)

Tyler, J and Mullen, F (2011) 'Telling Tales in School; Storytelling for Self-Reflection and Pedagogical Improvement in Clinical Legal Education' The Catholic University of America, Columbus School of Law, CUA Law Scholarship Repository

University of Huddersfield (2015) 'The Immigration Act 2014: Restricting Rights and Increasing Powers'. hud-test.eprints-hosting.org/id/eprint/30714

Vera, L. (2018) 'Misa Flamenca'. Not Boxed in Publications

Vygotsky, L (1978) 'Mind in Society' The Development of Higher Psychological Processes; Edited by. Michael Cole, Vera John-Steiner, Sylvia Scribner, Ellen Souberman; Harvard University Press Cambridge, Massachusetts, USA

Wallace, C (2017) The pedagogy of legal reasoning: democracy, discourse and community, *The Law Teacher*, DOI: [10.1080/03069400.2017.1395656](https://doi.org/10.1080/03069400.2017.1395656)

Walton, S (2002) 'The Nature and Pursuit of Happiness' *Practical Philosophy*, Spring 2002, www.society-for-philosophy-in-practice.org

Wanzer, M and Frymier, A (1999) "The Relationship between Student Perceptions of Instructor Humor and Students' Reports of Learning" (1999) 48 Communication Education 48.

West, D and Bleiberg, J (2013) 'Five Ways Teachers Can Use Technology to Help Students' Brookings Institution, www.brookings.edu

Yehuda, R et al (1998) 'Relationship between post traumatic stress disorder characteristics of Holocaust survivors and their adult offspring' American Journal of Psychiatry, 155, (6), 841-844

Ziv, A (1988) "Teaching and Learning with Humor: Experiment and Replication" 57 Journal of Experimental Education 5.

List of Cases

Donoghue v Stevenson [1932] UKHL 100

Hinz v Berry (1970) 2 QB 40

Morris v Murray [1991] 2 QB 6

Kafantayeni v AG of Malawi (Constitutional Case No.12 of 2005)

Jacob v Republic (Crim App No 16 of 2006)

APPENDICES

APPENDICES: CONTENTS

APPENDIX I: MALAWI REPORT	108-119
APPENDIX II: LAND LAW TEXTBOOK; INTRODUCTORY CHAPTER	120-127
APPENDIX III: LAND LAW TEXTBOOK; SKILLS CHAPTER	128-136
APPENDIX IV: LAND LAW TEXTBOOK; LAND LAW CHAPTER 1	137-159
APPENDIX V: IMMIGRATION ACT 2014 JOURNAL ARTICLE	160-181

Appendix i: Malawi Report

Written July – September 2004;

Published by Westminster University Centre for Capital Punishment Studies in November 2004.

Presented by me as a paper at the ‘Conference on Capital Punishment’ hosted by Westminster University in November 2004

LEGAL AID DEPARTMENT – LILONGWE, MALAWI

Introduction

This report aims to illustrate my internship experience whilst placed with the Legal Aid Department in Lilongwe, Malawi. The placement was co-sponsored by the CCPS [Centre for Capital Punishment Studies] at Westminster University and the Criminal Bar Association – and my thanks must go to both organisations for the opportunity and for their support, both financial and practical. It is not my intention to deal with the more logistical aspects of travelling and working with the Legal Aid Department in Malawi – I refer readers to the excellent account given by my predecessor Mr Aron Rollin. I must also thank Chloe Smythe for her valuable and insightful placement report from earlier

this year. It goes without saying that I am, and will always be extremely grateful to the Chief Legal Aid Advocate Mr Wezi Kayira, his deputy Mr Bruno Karemba, Mr Patrick Kauye at the Ministry of Justice and the entire team at the LAD for making me feel so welcome from the first to the last minutes of my placement.

Background

Malawi is a small landlocked country, 'wedged' between its neighbours – Mozambique which surrounds Malawi to the east, south and south-west; Zambia to the west; and Tanzania to the north. The entire country is only about 900km long and averages only 100km wide, with the awe-inspiring Lake Malawi covering almost a fifth of the country. In relation to the work needing to be done, though small, there is a population – mostly rural in traditional villages – of approximately 10 million people. There are *two* Legal Aid Offices, one in Lilongwe where I was based, and one in Blantyre, with the handful of advocates having the unenviable task of representing anyone needing their assistance. It should be mentioned at this point that the advocates practice in all areas of law – and I witnessed on a number of occasions the two Lilongwe advocates – Mabvuto Katemula and Suzgo Lungu simultaneously working on briefs in relation to homicides; family disputes; wills; contract matters and industrial negligence. It is a testament to their commitment and energy that they are able to achieve all this – especially after qualifying from Chancellor College Law School only a year ago.

Political and Legal Background

As with any legal system, politics can never be divorced from the law – and to state that Malawi is no exception is perhaps gross understatement. In 1891, Malawi was proclaimed part of the 'British Central Africa Protectorate' and was known as Nyasaland from 1907 until Dr Hastings Banda's 'Malawi Congress Party' swept to election victory in 1964 – and with independence the country was re-named 'Malawi'. It is therefore, due to its colonial past that Malawi 'inherited' the English Legal System, which continued after independence – and up to the present day. More than enough has been written about Banda's reign, and it is not necessary to add to that here – but

I would like to illustrate a number of vital points that are relevant to my internship experience. Firstly, Dr Banda whole-heartedly adopted the English Legal System – retaining and using to his full advantage the mandatory Death Penalty for murder and treason. In 1994, Banda buckled under popular pressure to hold elections – and Bakili Muluzi succeeded him creating a fledgling multi-party democracy. The second key point is that though President Muluzi introduced a moratorium - and to his governments' unarguable credit there have been no executions in the last ten years – the mandatory death penalty remains and is still very much colouring the entire criminal justice system. Finally, just a couple of months prior to my arrival, a new President – Bingu wa Mutharika became the latest incumbent of State House, after being endorsed by Muluzi throughout the election process. It remains to be seen whether the mandatory death penalty will, at one end of the spectrum of possibilities, be torn from its safely enshrined position within the Malawian Constitution, or at the opposite end – the new President will end the moratorium altogether. In conversations I had with Ministry of Justice officials, it became clear that the Malawian Government is more than aware of the perception of the public in South Africa – in many ways Malawi looks on South Africa as a 'role model'- that the rise in crime is in direct correlation with the abolition of the death penalty. However, as yet, there seems to be no movement away from Muluzi's position – but what *did* surface just as I was leaving, was the fact that Muluzi's government were implicated in the terrible famine of 2002, due in no small part according to Muluzi's detractors, to the fact that stockpiles of maize were illegally exported for personal profit. The effect on the Criminal Justice System was, and still is, simply that due to the famine, there were a huge raft of 'maize murders' – where farmers attacked and killed thieves caught attempting to steal maize from their gardens and fields – resulting in hundreds of farmers and their 'guards' being arrested, charged with murder and thrown into prison – almost all of whom are still 'on remand' years later. When this type of crime is added to the 'witchcraft' and alcohol related murders – it quickly became evident to me that the mandatory death penalty still hangs like the sword of Damocles over the heads of prisoners accused and charged with either very dubious evidence or where they have a strongly arguable defence. The main body of my report will hopefully illustrate, using cases I personally worked on, and prisoners I met on a number of occasions, exactly how flawed the system in Malawi seems to be, and as such, how legally and constitutionally unsafe is the existence of the mandatory death sentence within such a system.

1. THE PROCESS

The process begins with the local police arresting the suspect – usually on a nebulous complaint from what in Malawi is called a ‘reporter’ – i.e. the person who reports the crime [who in turn is usually one of the victim’s family members, and thus is hardly impartial]. Then they caution the accused, usually on the strength of what the reporter and other like-minded ‘witnesses’ have said. Then, and perhaps even more worryingly, the police act as translators – translating the caution statement, the charge, and any reply by the accused, into English – which the accused duly signs – or, more usually, ‘thumbprints’ where they are illiterate. There is no such luxury as a duty solicitor – [again, apart from this being an alien concept, it is due to lack of resources combined with a lack of communications – often the phone lines ‘crash’ so it would be impossible to bring a ‘real time’ arrest to the attention of the LAD, and that is assuming it is within office hours] so the ‘accused’ is left vulnerable to coercion [most police statements contain the phrase ‘I state that no force was used’ – again with agreement ‘thumbprinted’ after ‘translation’]. As they then act as prosecutor, there is without doubt, a question mark hanging rather dramatically over issue of a fair trial. As agents of the State, it can be argued that the police cannot remain neutral, and while not suggesting that police corruption is rife, it is clearly in their interests to arrest, charge and convict with minimal work, as they too are understaffed and stretched to the limit. In one area alone – Dedza, according to a graph on the police station wall – there have been over a dozen homicides alone in the first half of 2004. With the backlog of cases dating back TEN years in some cases – it remains a lottery as to when the ‘accused’ in these cases may face trial or sentencing.

2. THE FILES

All files sent by the police via the Director of Public Prosecutions to the Legal Aid Department are hand-written [see below] and as such, my remit on arrival at the LAD

was to set up a computerised case-management system, and perhaps in practical terms, this turned out to be the most valuable part of my work in Malawi. After a discussion with ‘the chief’ as to format, I set about the computerisation of all homicide files. On first glance, it seemed that each file followed a similar pattern; cover page detailing the case name and number; instruction sheet comprising of statement taken from the client – usually from prisons such as Maula or Dedza; Witness statements; post-mortem reports; medical examination reports of the accused; and of course the accused’s reply to their caution. The standard varied from the perfectly printed, to the ‘bashed out’ on an old typewriter, to barely legible handwritten scrawl. What I found quite terrifying, was that thus far, these files were perhaps the only thing standing between a person’s liberty and, at the other extreme, their possible [though still ultimately postponed] death sentence. I spent some time drafting out templates, and discerning and typing out witness statements and cautions, so that the files could quickly and efficiently be placed safe within the realms of a PC folder, rather than disintegrate on a shelf.

The next stage was to train the secretaries and the paralegals how to use the system, so that in the future, ALL cases, criminal and civil, will be computerised, to enable quick access to a file and its information for trial or hearing preparation. The advocates, Suzgo and Mavuto, also expressed delight at the prospect of being able to call up a case file at the touch of a button – rather than wade through disintegrating files on floors and shelves. As I left Malawi, this system was about to be introduced in the LAD in Blantyre. It must be said at this point, that though the legal system in Malawi is flawed and drastically under-funded and under-resourced, the work of the entire team at the LAD is highly impressive – and it was extremely rewarding to feel that the work I had done in relation to the ‘e-files’ would make their jobs a little easier – ultimately giving the ‘accused’ better access to justice.

3. FLAWED INVESTIGATION

Two cases specifically illustrate this problem – where the ‘accused’ has been kept in prison on the basis of a completely flawed investigation. The first case involves a

young woman charged with murder – the second, a long-serving remandee, was a man charged with arson and murder.

The prisoner in the first case was to be found in the women's section at Maula Prison in Lilongwe. The women – young, old and most shockingly, with their babies or toddlers – were held – admittedly with more space [as there were far less women than men] in slightly less filthy conditions. It soon became clear that as expected, the women, on arrest, faced a very different – 'gender-specific' problem to that faced by the men. We took a statement from a 21 year old woman, with a two year old baby. She was 19 when 'remanded' in Maula with her new baby [inappropriately named Lucky] – on a murder charge. The facts are briefly that she and a 'witchdoctor' were arrested for poisoning the girl's own grandmother – who died from drinking some 'medicine' provided by the witchdoctor. They were both arrested, at which point the 'doctor' was released without charge, whereas the young girl was told that she too could be released if she allowed them to, as she put it, 'have fun' with her, or 'rot in Maula'. She refused, and they were true to their word. As she sat crying uncontrollably in the dust of Maula, with her two year old - it struck me [again] that the death sentence – especially mandatory – and ESPECIALLY in so many cases where there is fabricated or non-existent evidence – often based on hearsay or a vindictive or jealous neighbouring farmer, or a corrupt official – cannot be allowed to go unchallenged.

One of the longest serving prisoners, and also the one with the most flawed case investigation, I will call Esau - aged 55. He was arrested and taken to Maula on 16th November 1999 on a charge of arson and murder – after supposedly setting fire to a grocery store and killing the night watchman. However, there was NO evidence against him; witnesses failed to identify him even though he was a co-worker; and no motive whatsoever. The only 'evidence' is a confession that Esau states he was beaten into giving. Using the e-file I had generated, bail was being applied for as I left.

4. MURDER/MANSLAUGHTER – THE CONFUSION

The real issue here, is that there is a difficulty in convincing the ‘people’ that a fair trial with a fair verdict is tantamount to ‘justice’ being done – the over-whelming doctrine seems to be that ‘killing is killing’ - the Chichewa proverb *pari bi pari minga* [no smoke without fire, or more literally, where there is a dark spot on a person’s skin, there MUST be a thorn beneath it] seems to be uppermost in the minds of police, ‘reporters’, witnesses, and jurors alike. It seems that if the accused are told at caution that they have ‘killed’ - THEY believe they have committed murder, and so plead guilty. Hence, the perversity lies in the fact that the DPP seem to charge ‘manslaughter’ quite freely – not confident enough to leave the question of manslaughter to the jury, purely in an attempt to circumvent the mandatory death sentence. The real danger here, is that on many occasions, cases where self-defence, provocation and even insanity are present as key elements, manslaughter convictions ensue, which in turn lead to long jail sentences tantamount to a death sentence in any case. The real problem though, which continues to perpetuate the backlog, is that in the vast majority of cases, the police almost exclusively charge ‘murder’ regardless of whether there is little or no evidence; whether there are clear defences present such as those highlighted above, or even where the true charge, in a handful of tragic cases I encountered – should be infanticide [explicitly set out in the Constitution but almost always ignored by the police]. The case of **T** perhaps best illustrates this point.

The undisputed facts, complete with frank admission by the accused and accurate [for once more than just hearsay] eye-witness evidence, are that T was the mother of two children, and then became pregnant. After moving to her grandmother’s she gave birth to twins. Though she had moved away for the birth [it seems that she may have been embarrassed at being unmarried] she made arrangements and carried these out, to return home. On the journey home, she arrived at a river and suddenly, seemingly from no-where – had ‘thoughts’ to kill her twins – and, after telling her older children to wait by the roadside, she went to the riverbank, and threw her twins to their deaths. After later being arrested and charged with murder she was then locked up awaiting trial – even on a guilty plea – and has remained in prison, away from her other two children, for the last TWO YEARS. It seems probable that this is a tragic case of post-natal depression, but even so, due to the enormous backlog, this young woman has been in prison, in terrible conditions, for so long awaiting mere sentencing. This is typical of the enormity of the problem here – where government funding is needed in

order to proceed to trial, and where ministerial attitude tends to suffer from what at best can be seen to be a lack of urgency.

However, on a more positive note, I witnessed on a couple of occasions the work of Penal Reform International, in Malawi operating through a group called the Paralegal Advisory Service, who are closely linked with the LAD, but nevertheless operate independently. In Maula they spend a lot of time carrying out 'training sessions' with remandees, informing them of what to expect if and when they get to trial, and also having discussions in relation to the difference between murder and manslaughter.

5. THE PRISONS

It is, I think, impossible to prepare mentally for the experience of visiting a Malawian prison for the first time. On arrival, the first image you are faced with is a double wall of barbed wire fencing – remand prisoners – hundreds if not thousands of them, on one side of the 'vacuum' – their friends and family visiting them on the other, separated by a good 6ft void. On both sides, prisoners and visitors cling to the wire, in a futile effort to get closer to each other. There were a number of prisoners dressed in white uniforms – these were the convicts – all of whom seemed to be working – either opening and closing the gates for their fellow remand prisoners – or, involved in 'hard labour' – chopping wood for example. It arose that the prisoners who were the subject of our visit on this occasion, were father and son, and were charged with murder about a month ago – the father suffering from pneumonia and having been taken to the prison 'hospital' only to be told there is no medicine. Dressed only in a filthy 'kagool' type jacket – but with no t-shirt or shirt, and a pair of equally filthy jeans that were literally hanging off his emaciated frame, it became clear that if the usual timeframe for a court hearing was adhered to – i.e. 2-3 years at least – this man would not live to face trial. What became even more evident, as the paralegal interviewed him, was that the son had been the one to commit the act of 'murder' [though strongly arguable self-defence] while the father was not even present. The son, who was 19, epileptic, and had a mental capacity of a minor – had unwillingly implicated the father, by merely mentioning his name in police interview, which again, without a responsible adult, should never have taken place. As these two men were interviewed, the next

remarkable thing occurred – it seemed a steady queue of remandees was beginning to build at the door of our interview room – which incidentally was a dusty, smelly, fly-infested room just through the main prison gate, but not quite inside the main area of the prison. These men, all remandees awaiting trial, were all known to my LAD colleagues. It appeared that at some point over the last two or three years, these men had been arrested and thrown into Maula. As each came in to the room, my colleagues were besieged with pleas and questions – but it seemed the question was always the same – ‘when is my court case?’ It seems that there is a drastically urgent need not only to review the mandatory death penalty in a system where investigations; arrests; knowledge of the law; charges; and convictions are fundamentally flawed, but also to review the process itself, where people can be left rotting in prison for YEARS awaiting a trial.

6. JUVENILES

The first juvenile case I worked on was in relation to a group of 3 boys, the youngest 13yrs old, who ‘worked’ as garden guards, armed with clubs and the infamous panga knife – [a slightly smaller version of a machete – definitely NOT a knife] guarding crops of ‘Irish’ potatoes that sell for approximately 30p a bag. These boys are sent to the garden each night from about 6pm until the sun comes up at about 5.30am, to deter any potential thieves. Of course, the owners don’t really think about such details as consequences, should a thief appear. One night, this of course happened, the boys went to investigate, the thief lashed out at the boys with his potato cutting knife, and the boys, already ‘adrenalised’ due to the presence nearby of what they believed to be hyenas, defend themselves – but unfortunately, they are armed to the teeth with their weapons, and not surprisingly, the thief is fatally wounded. The next day, the owner [clearly protective of his workforce] reports the death to the police, handing the boys over. The boys are charged with **murder** and despite the facts being clearly given to the police, they are thrown in Maula jail, and may well be there for the best part of the next couple of years until a trial can be arranged.

On a visit to the juvenile prison at Kachere, in central Lilongwe, other equally shocking cases came to light. The first case – that of **K** – aged 15 - involved the death of a 6-year-old child who died after playing in the river with the accused – not, it seems a victim of drowning – but more likely from a disease brought on by the filthy water. The victims’ parents failed to take the sick child to hospital, but rather fed him ‘medicine’ at home - whereupon he died. They then blamed the accused, who was arrested and brought to Kachere in **NOVEMBER 2002** [at aged 13] where he has been ever since. Another case – that of **L** – aged 18 now, and 17 when arrested – is the more usual case of self-defence – hitting out [fatally] at his uncle who was attacking him. He has been in Kachere since October 2003. Another shocking case, is that of **N** – now 17, arrested at 16 for ‘killing’ his own mother, who whilst drunk, he hit ‘once on the arm’. She died, according to the accused, three weeks later, and the headman told him that she had died “of the left arm that he had hit her”. However, the boy is aware that the mother had heart disease – and this is surely more likely to be the cause. N has been in Kachere without a court appearance, since March 2003. Many of the other cases are the type of typical schoolboy fight situations that can be found the length and breadth of any country – developed or developing. The difference here is that due to the fact that the boys work in the fields, they are usually armed with sharp-bladed hoes, axes or pangas, and so a simple ‘punch-up’ becomes a fatal attack. Until these boys are ‘disarmed’ by way of a change of lifestyle, culture or situation, this problem is likely to continue way into the future. Once again, the fact that these boys may well be in prison for many years pending trial on a murder charge is bad enough, but in a system where the noose may be their final fate, the situation is horrifying.

7. THE CONSTITUTION

The Constitution of Malawi, in force from 1994, does indeed safe-guard fundamental human rights – the right not to suffer torture, inhuman or degrading treatment [s19 (3)]; the right not to be detained without trial [s19 (6)(c)] and the right to life [s16] though qualified by making an exception for the death sentence. In practice though, it is a very different story. I neither saw nor heard any evidence of torture in the prisons, but there

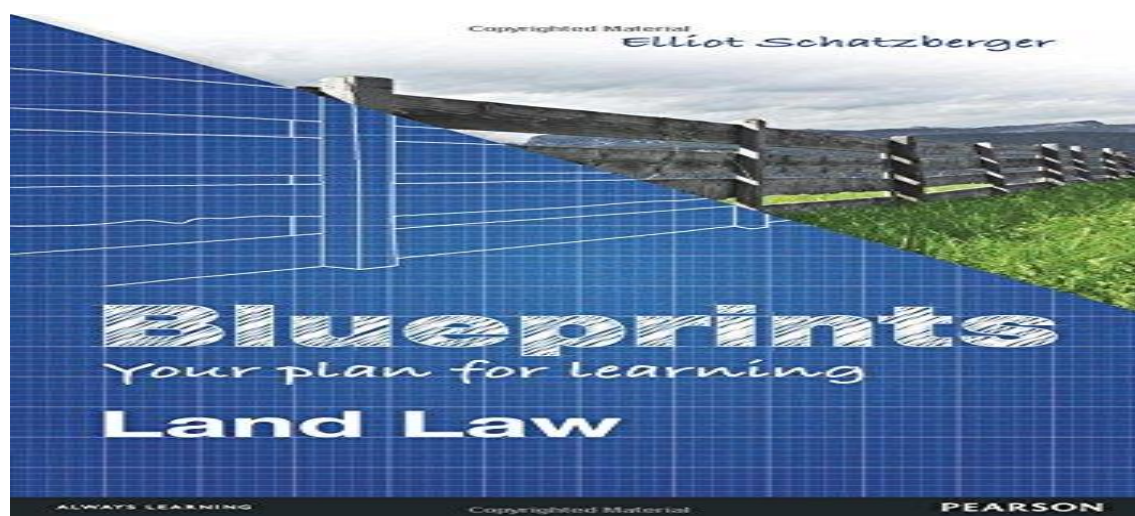
is much evidence by way of witness statements that beatings are commonplace in the police stations. By normal western standards, conditions are inhuman and degrading in the prisons – but according to people working inside the criminal justice system, there is a governmental belief that it is ‘prison after all, and not a hotel’. As for the right to life, this is perhaps the way that the mandatory death penalty could be challenged. The Malawi Law Commission has recently called for submissions from the public, in relation to a comprehensive review of the Constitution, with a Constitutional Conference to follow next year. The Minister of Justice and Constitutional Affairs, Henry Phoya, has stated that the commission wishes to carry out a review on provisions identified as inadequate to address issues that have surfaced in the last 10 years. This could pave the way for a challenge to the mandatory death sentence as being unconstitutional – and I hope that the interns who replaced me may be able to pursue this further, armed with the evidence as detailed in this report as to the fundamental flaws in the system. Once again though, on a positive note, the Constitution does insist on an independent judiciary and access to justice, and the court system itself, whether the Supreme Court in Blantyre [see fig vii] or the lower courts [fig viii] all operate in an atmosphere of gravitas and due reverence to the law – court officials, magistrates and judges alike all extremely conscious of the importance of their respective roles. Again, set against the lack of funding within the system generally, and the ‘barn-like’ nature of some of the courts [see fig viii], this was greatly impressive.

CONCLUSIONS

I hope that this report has not only provided an insight into the work of an intern at the LAD in Malawi, but has also highlighted the social, political and legal aspects in relation to the Death Penalty in Malawi. It must be said that of course, there were many frustrations in my two months at the LAD. However, these were heavily outweighed by the positive results achieved. Firstly, the team at the LAD were an absolute joy to work with – their never-ending humour and vivacity was an inspiration. Secondly, following on from what had already been achieved by Aron and Chloe, it was extremely rewarding to be able to have set up a system of case-management that will hopefully

be nationally implemented and will help to speed up the process of bringing prisoners to trial, hopefully cutting down the backlog that has developed due to the lack of homicide trials this year due to a lack of funds. It was frustrating that I could not witness a homicide trial, but I hope that my case preparation will make life easier for the advocates and ultimately the prisoners when trials do resume [hopefully in November]. Thirdly, due to working on the files, four prisoners who had been 'on remand' for many years were released – either on bail, or, in one particular case – unconditionally as charges were dropped due to lack of evidence. It was probably the best moment personally [with the help of interpretation] when I told Mr N that he was being released after SEVEN years without trial on a case where there was NO evidence. Finally, the work in Malawi has only just begun. There is enormous scope to make a REAL and telling difference – not only to the lives of those working so hard within the LAD, but more importantly to the lives of the many people detained without trial in the prisons of Malawi, many of whom have the death penalty still haunting them continually. There is much still to be achieved.

Appendix ii – Land Law Textbook - introductory chapter



Introduction to Land Law

Introduction: Why study Land Law?

Land law has a reputation for being one of the most difficult core subjects, and there is perhaps a very good reason why the study of land law does not come along until year 2 or sometimes year 3 of an LLB course! I often ask my students why they feel that Land is more difficult than say, criminal law or the law of contract - it isn't even worth asking whether they think it *is* more difficult! The answer I get varies enormously of course, from the '*it's so boring*' to '*it's not relevant to me*' to '*it's too technical*'. The truth is that it *is* rooted in the history of the feudal system (see Chapter 1) and that it *is* 'technical', being part and parcel of the practice of conveyancing - the buying and selling of property. You perhaps may not have much experience of buying and selling a property; being a landlord or taking a mortgage, in the same way that perhaps you may have never been involved in setting up or benefitting from a trust (the reason why Equity and Trusts comes close in 'degrees of difficulty' to Land Law.) My view though, is

that it is the language and terminology that causes problems early on in the study of Land law. If you fail to grasp the key terms, the key concepts, then you may well be lost, and may well struggle to find your way back. This could prove 'fatal' especially if you don't 'get back' before the examinations! Let me give you an example. In Criminal law, if you hear in a lecture that you are about to study the law on 'murder', then you already know that you are about to hear about dead bodies! Unfortunately murder is something that we have all grown up with in the media. We are only too aware of high profile cases like the Moors Murderers Hindley and Brady; the murder of the toddler James Bulger by Thompson and Venables; the Soham murders of Holly and Jessica by Ian Huntley; and further afield, the alleged murder by the South African paralympian Oscar Pistorius. All of these seep into our consciousness, and so when you start to study law, and go to your first criminal lecture on 'murder', in a strange way, you are probably looking forward to the lecture pre-armed with the confidence of at least a basic understanding of the concept of the crime.

In contract law too, usually studied in year 1, you are probably familiar with the idea of buying and selling goods; employment contracts; even such topics as 'exclusion clauses' become clear when you realise that a sign in a car park or nightclub saying 'management accept no liability for loss or damage' is in fact, such a clause in a contract. Thanks once again to avid reporting in the media, we are also very familiar with the concept of 'damages' even though we may not realise that this is for 'breach' of a contract.

I would argue that the same level of awareness does not exist in relation to the language and terminology of Land law. The media does not regale us with tales of '*proprietary rights*'; '*equitable interests*'; '*registered land*'; '*unregistered interests which override*'; '*overreaching*' or even perhaps the slightly more common '*easements*' and '*covenants*' - not

to mention the historical background to land law which throws words like '*chivalry*', '*socage*' and '*frankelmoin*' at us!

My task, in the writing of this book, is to take away the 'fear' of such terminology, and to try and make you as familiar and comfortable with these terms as you might already be with 'murder' and 'theft'. Everything worth understanding takes a little more effort, and Land law is no different. You may have a desire only to pass the module, and never to allow land law to trouble you again. You may though, and I hope that this book will help you to achieve this goal, go on to understand law in general far more comprehensively, because you have managed to 'crack' land law and its complexities and nuances. You may of course go on to use your study of land law if perhaps, once qualified, you become a *bona fide* land law practitioner. You may also find that knowledge of land law is far more useful in a practical way, much more than just a subject to learn in order to get through yet one more core law module. Before we move on, let me give you a few practical examples, other than the more obvious 'study to pass' reason, as to why the study of land law has enormous relevance;

- A dispute with a neighbour over a boundary - this involves **easements** (chapter 8) and possibly **adverse possession** (chapter 4)
- Taking out a loan from a bank to buy a property - more obviously, this involves the law on **mortgages** (chapter 10)
- An agreement that your neighbour will not turn their property into a music venue or bar - the law on **covenants** deals with this (chapter 9)

- You buy a property with your partner, but are unsure of who owns what percentage of the property - this is covered by the law of **co-ownership** (chapters 5 and 6)
- You make a promise to your friend that when you die the property will be 'all theirs' - the doctrine of **proprietary estoppel** is relevant here (chapter 7)

So, perhaps we are far more aware of such Land law issues than we may have believed, it is simply the terminology and the 'rules' that need to be understood. The purpose of this book is to help you understand not only why it is necessary to study land law, but also to teach you how to study and how to apply what is, in fact, a very living breathing subject.

Land law in action

Before the case of *Stack v Dowden 2007* appeared before the House of Lords, presided over by Baroness Hale, it had long been established that if you lived as an unmarried couple with your partner, where one partner was named as the sole legal owner, the *unnamed* partner could only lay claim to a percentage of the property if they had contributed to the purchase price at the time of purchase (a resulting trust) or contributed to purchase price or mortgage payments after the purchase (a constructive trust). This of course, in situations where the male partner was named as the sole legal owner, left unmarried women in particular, in a very precarious position. In the case of *Lloyds Bank v Rosset* in 1991 (note **1991** not **1891**) , Lord Bridge decided that even though married, Mrs Rosset had absolutely no percentage of the ownership of a property held solely in her husband's name. The fact that she had been overseeing renovations and project managing the builders was no indication of ownership - she was only doing, according to Lord Bridge, 'what any good wife should do'!

When the case of *Stack v Dowden*, an unmarried couple, came before the Lords, it just so happened that Baroness Hale was in the driving seat. She decided that the *Rosset* approach was no longer appropriate in the 21st century. She decided that a couples' joint ownership should be based not just on a purely mathematical computation of early contributions to purchase and mortgage payments. She made it very clear that the law must 'move on' and that a 'holistic approach' should be taken which takes into account the entire 'course of dealing' within a relationship. It was only fair to calculate percentage ownership in terms of the entire input into the relationship... any and all contributions financial or otherwise could be used to compute the 'quantification' of the partner's share. *A first rate example of 'land law in action' in the 21st century.* The impact of this ruling was felt in *Jones v Kernott 2011* where Miss Jones was awarded a 90% share of the property to her ex-partner Kernott's 10%. This was based on her 'holistic' contribution even though there seemed to be an agreement in existence from the early part of their relationship which stated a 50/50 share of ownership. Mr Kernott's 'abandonment' of Miss Jones, leaving her alone for many years to pay for the mortgage on the property and take care of the maintenance, allowed the share to 'ambulate' or move over the years, resulting in a finding of 90/10. I explain all of this in far more detail in Chapter 5, but it serves as an excellent example of how land law lives, breathes and develops.

Look out for recent cases at the Court of Appeal or the Supreme Court, and keep an eye out for land law related 'stories' especially in the business press. Commercial property disputes, squatting and matrimonial breakdowns sell newspapers nearly as much as a murder!

Key skill: seeing the bigger picture.

Fortunately or unfortunately, we have to teach land law, like with most other core areas of law, in a very compartmentalised way. You will see at a glance that my book is split, as all text books are, into chapters, and those chapters are also split into various parts using headings and sub-headings. It is necessary to do this for reasons of clarity and structure, and in relation to memorising the law for examination purposes, you must 'learn' the subject in this very systematic and methodical way. It is perhaps no surprise that a very good friend at law school (I will call her Lucinda) did extremely well in her study of law, as she came to law as a second career after already qualifying with a Doctorate in mathematics from Cambridge University. If you have seen the movie *The Beautiful Mind*, Russell Crowe's character has the ability to work out complex mathematical equations in super-fast time whilst scribbling on a blackboard. Lucinda was able to do exactly the same with a law problem, taking a very systematic approach - even with a hangover! When I try to help you to understand how to plan for examinations later on in this chapter, I will return to Lucinda and her methods, but it is important to understand that learning land law in these 'bite-size' chunks is the key to success. However, it is also vital to understand the '**bigger picture**' and work out how land law fits together like a complex 10,000 word jigsaw puzzle. We all know that you need to find the corners first, but looking at the 'big picture' on the box helps you to achieve your goal. It may take some time to see the 'bigger picture' of course - one problem with teaching topic by topic, chapter by chapter, is that you may not really see all of the connections until the end of the land law module. Don't worry if that is the case, law like many subjects is a 'dripping tap' and as another good friend at law school 'Darren' said to me, the key is to 'hold your nerve' until the picture becomes clear...and it will! Let's take an example of how it all fits together. Let's imagine that you have a typical 'problem question' as follows;

Richard buys a 'registered' property called 'The Tower' from Edward. When Richard takes possession of 'The Tower' he finds Elizabeth in an attic room claiming Edward had granted her a 10 year lease. He also meets Anne, who lives in the neighbouring 'Castle Mount' and claims that Edward had always allowed her (Anne) to ride her horse across Edward's land. Richard also finds Henry, who owns 'Tudor Mansion', which adjoins 'The Tower' on the other side to Anne, and claims that Edward had an agreement with him (Henry) that Edward would not build any structures within 5 metres of the boundary. Richard has taken a mortgage from the 'Bank of York' to buy 'The Tower'.

Richard wants to know if anyone may have a claim on his newly acquired land.

At first glance this is a question dealing with possible third party rights that may be binding on a new owner. To answer this question effectively needs a thorough understanding of the Land Registration Act 2002 (chapter 4) but reading this chapter alone is not enough to fully understand how to apply the law. To see the bigger picture, the issues and necessary chapters are as follows;

- The meaning of 'registered land' - chapters 1 and 4
- Legal and equitable interests - chapter 2
- A 10 year lease (Elizabeth) - chapter 3
- An easement (Anne) - chapter 8
- A covenant (Henry) - chapter 9
- A mortgage - chapter 10
- The workings of the LRA 2002 in relation to third parties - chapter 4

To answer this question in an examination would need an in depth understanding of each issue (and chapter) but would also need you to be able to 'put it all together' to give a coherent and structured piece of advice to poor Richard! Again, the aim of this book is to help you to be able to do exactly that.

Study Skills

Study skills

When studying law, it is essential to be able to apply a number of skills and techniques which you may have already picked up on your way to the study of land law. Some of these skills have hopefully been developed since the early part of your studies in law, probably from when you began studying the English Legal System and the development and workings of the common law. You will hopefully have already developed certain skills in applying case law; using statutes; referring to academic sources and more generally, answering problem and essay questions. Here are just a few more tips on how to apply these skills effectively specifically in a 'land law' context:

Study skill: essay writing

There are certain questions which lend themselves more obviously to an essay answer rather than a problem question. Essentially, your preparation should not really be any different whether the question is an essay or a problem. You still need to learn and apply case law and statute, but the key difference with an essay is that you are not required to *apply* the law to a given scenario. Rather you are expected to explain the law and perhaps, depending on the question, to critique the law in that particular area. You should still explain cases and statutory provisions but also add some judicial comment and even academic critique where relevant. Let's take the example of co-ownership once again. Here is a typical essay question:

'The law on co-ownership is confused and in need of reform, especially in relation to unmarried couples. Discuss'

You would hopefully recognise that the essay is asking you to 'discuss' the law, meaning that there is a need to be a little critical in your approach rather than merely descriptive. The essay should of course have an introduction; main body and conclusion, like any other. In the introduction you should set the scene and lay down the objectives of the essay you are about to write. I suggest that you do not **start** with a 'conclusion' - a pet hate of mine - conclusions should only be found in one place - at the **end** of the essay! Once you have set the objectives - maybe here saying that you are about to analyse the historical development of the law on co-ownership, by explaining the thread of case law running from *Pettitt* and *Gissing* through to *Rosset* and then on to the 'holistic' approach in *Stack* and *Jones* (chapter 5) - you move on to the main body which will of course explain these cases in some detail. It is always a good idea in an essay to refer where possible to the judges where they have made an impact - **Denning** in *Eves v Eves* in 1975, **Bridge** in *Rosset*, and of course **Hale** in *Stack* and *Jones*. A really sound essay, with critical analysis will explain why Hale was advocating a holistic approach in *Stack* - berating Parliament for failing to legislate for unmarried couples in this area of law. It should also go into some detail on Lord Neuberger's dissenting voice in *Stack* explaining his reasoning clearly. The essay should also build to a discussion of case law post-*Stack* and *Jones*, looking to what the law is saying on this right now. If possible, your essay should contain a few academic references, including authors such as Martin Dixon who has written extensively in *The Conveyancer* journal on this and many other topics. The conclusion should sum up your points, but also end with a strong clear statement which either agrees or disagrees that the law needs reform.

Study skill: problem questions

The key difference here is that you need to apply the law to the facts of your scenario. It is not so important in answering a problem question to give critique, or even academic opinion. Only the law is really necessary. Think of it as dealing with a client in practice. If a client comes to you for advice, asking whether he has a strong claim, he doesn't want to hear '...ah yes, Professor Dixon on page 47 says...', the client wants to know the **law** itself - their legal position. Hence answering a problem question needs you to carry out a legal dissection of your scenario. Harvard Law School developed a method for analysing and planning an answer to a problem question - and this method is widely used across the globe. It is commonly referred to as the IRAC method of case study/problem analysis. Not pretending to be wiser than Harvard Law School of course, I nevertheless like to teach this as the **PIRAC** method as I believe Harvard ignored the obvious start point! So what is the PIRAC method of case analysis - let's use it to analyse the problem question I posed earlier:

Richard buys a 'registered' property called 'The Tower' from Edward. When Richard takes possession of 'The Tower' he finds Elizabeth in an attic room claiming Edward had granted her a 10 year lease. He also meets Anne, who lives in the neighbouring 'Castle Mount' and claims that Edward had always allowed her (Anne) to ride her horse across Edward's land. Richard also finds Henry, who owns 'Tudor Mansion', which adjoins 'The Tower' on the other side to Anne, and claims that Edward had an agreement with him that Edward would not build any structures within 5 metres of the boundary. Richard has taken a mortgage from the 'Bank of York' to buy 'The Tower'.

Richard wants to know if anyone may have a claim on his newly acquired land.

PIRAC;

P - start by looking at who the *parties* are and who you are asked to advise - here the parties are all of those highlighted earlier, and you are asked to advise Richard...the new proprietor of 'The Tower'

I - what are the *issues* - the issues here are that Richard has bought the land but there are pre-existing rights that may be binding on him: the lease; the overriding interest of 'actual occupation'; the easement; the covenant and the mortgage

R - this stands for the *Rule of Law*. - in other words, what law are you going to rely on and apply to the scenario. The start point here, as always where relevant, is statute - here the Law of Property Act 1925 for definitions of leases; easements and mortgages, and the LRA 2002 to see how these rights, along with covenants, may be binding. Then case law should be used to argue your position.

A - this is for *application* - the most vital part of any problem question. You need to take the law on leases from the relevant sections of the LPA 1925 and use the LRA 2002 sections (s27:29 and Schedule 3 paragraph 1) to apply the law to Elizabeth's lease. You also need some basic 'lease' case law (such as *Street v Mountford*) to back up your points. Elizabeth may also be in 'actual occupation' so Schedule 3 paragraph 2 and relevant cases such as *Chhokar* will also help here. Anne's easement may need application of the case law on easements (*Re Ellenborough Park*) and Schedule 3 paragraph 3 of the LRA 2002. Henry's covenant will need to be analysed through case law - and an explanation of covenants needing a 'notice' under s32-35 LRA 2002 will be necessary. Finally, mortgage law will be needed - relevant case law and application of s101-105 LPA 1925 (detail on all of these points can be found in the chapters highlighted above)

C- finally you will need to draw **conclusions** as to whether Richard is bound by any or all of the pre-existing interests. Never sit on the fence, always try to come to a solid conclusion. Remember that land law is civil law not criminal, so you only need to be sure '**on the balance of probabilities**' in order to advise your client, meaning 51% to 49%, you never need to be sure '**beyond a reasonable doubt**'.

I should stress that this is a way of planning a problem question answer, not necessarily the style in which your answer should be written. You may also need to apply PIRAC a number of times within one problem question if there are numerous issues or parties. We will deal with style - the use of the law - next.

Study skill: how to apply cases; statutes and academic opinion.

Whether you are answering an essay or a problem question in an examination or a coursework, or even if you are trying to advise a client in practice, the key to your success is in being able to apply the law to your scenario. I always tell my students that you can't arrive in court and argue to the judge that the court should favour your client simply because it would be 'fair', or that your client is a 'good person'. Whether you are arguing academically or professionally you will be expected to refer to your 'source of law' and give your '**authority**'. This means that you must **use** the law to argue your point. Let me give you an example from the world of English Literature. If you studied this subject at school or college you may well have studied a play such as Shakespeare's *Romeo and Juliet*. You may be faced with an essay question asking you to discuss Juliet's dilemma as to the fact that Romeo is part of the enemy Montague clan. You would of course want to refer to *the* famous speech by Juliet, found at the start of the 'balcony

scene' which starts '*Romeo Romeo, wherefore art thou Romeo*'. Contrary to the popular misconception, this is not Juliet asking where Romeo is - she is asking why he is *called* Romeo - why he is a Montague. In order to make this point in an essay though, you would need to reference the text of the play- 'according to Act 2 Scene 2...'. This would be your 'authority' and would score the points in your essay. This principle is exactly the same when referring to or applying law. It is necessary always to refer to either the name of a case, the provisions of a statute, or European law where appropriate (though the latter is not really a part of the study of land law). So how do you go about this?

The first thing to remember, especially in a problem question, is that you *apply* the point of law to the facts of your scenario rather than give a full explanation of the facts of the case itself. You are aiming to use the *ratio* of the case to help prove your point. It may be appropriate to set out what I call the 'trigger facts' - by that I mean the briefest of facts of the case that help you to apply the law to your scenario. In an essay however, you may have more scope to explain the facts of the case itself, as of course, there is no need for application to a given scenario. In an essay, you may also want to refer to academic opinion, though as I suggested above, this is not strictly necessary in a problem question. The best way to explain what I mean here is to give you an example.

Let's take the situation of Elizabeth again. You may remember that Richard has bought 'The Tower' and has now found Elizabeth in an attic room. Leaving the lease to one side, you would need to advise Richard that Elizabeth may have another proprietary right (if the lease in itself is not binding as it may not be on the register and is not an overriding interest - see chapter 3 and 4), that being the right of a person in '*actual occupation*'. You would firstly refer to the LRA 2002 schedule 3 paragraph 2 - schedule 3 rather than schedule 1 as this is land which is already registered land. You would explain that schedule 3 paragraph 2 sets down that a person

in actual occupation may have a binding 'interest which overrides' if Richard either knows Elizabeth is there, or '*on a reasonably careful inspection of the land it is reasonably obvious*' that she is in occupation. However, though statute is always the start point when applying the law, where relevant, the next stage is to use case law to 'put the flesh on the bones' of the statute. You would need to apply a number of cases here, all of which carry a relevant ratio. Firstly, Elizabeth must have a proprietary right to begin with, as in ***National Provincial v Ainsworth*** - don't forget to apply the ratio - she *does* have such a right - the lease. Secondly, she must be there at the time of the transfer to Richard - as in ***Abbey National v Cann*** where Mrs Cann's furniture was there before transfer but she was not. Thirdly even if she is away at the time of the transfer, if she can show evidence of an intention to return and there is also evidence of her physical presence, then she is still in actual occupation. ***Chhokar v Chhokar*** can be applied here, where Mr Chhokar sold the house while his wife was away in hospital giving birth - intention to return was clear as was enough evidence of her presence - Mr Chhokar had only hidden some of her belongings not all. Hence to conclude, Elizabeth may have an 'overriding interest' which may bind Richard (note that it would be the terms of her lease which then bind). All of this is explained in far more detail in chapter 4 - but that is how you would apply the law. You will see that I applied the ratios, and where it helps, gave brief facts of the cases to strengthen the application of the law to the scenario. Of course, if your scenario has slightly different facts to the actual case, then you would need to 'distinguish' the case from your scenario to argue a different outcome. For example, if Elizabeth's belongings were completely hidden, this can be distinguished from ***Chhokar***, and the conclusion may be that she is not in discoverable actual occupation at all. As I suggested above, if this was an essay question on overriding interests, you may well also include any academic opinion or judicial comment - especially dissenting judgments (see Hale/Neuberger in chapter 5) that you have read.

Study skill: how to prepare for an examination

There have been many books written on how to prepare for examinations, but I thought I would give a little advice on how to prepare specifically for an examination in law. As I explained at the beginning of this chapter, it is necessary when writing any answer to a legal question to support your arguments with relevant law. This means that it is necessary to learn and memorise many cases to help achieve this goal. Your aim is to apply relevant case law as I have demonstrated above, but how do you go about remembering many cases and their points of law? Different students memorise in different ways of course. You may memorise by writing out the cases many times over. You may take a more 'audible' approach and repeat cases to yourself many times or you may simply read them over and over. My fellow student at law school, 'Lucinda', memorised by writing cases and their points of law on sticky notes and placed them over all available wall space at her home. Another friend, let's call her Marion, made up sentences starting with the first letter of each case name in the order in which the cases were to be applied. For example, if Marion was trying to remember the line of cases for co-ownership (chapter 5) - *Pettitt; Gissing; Eves; Rosset; Stack and Jones* for example, she would try to remember '*purple geese eat radishes sprouts and jelly*' - the more ridiculous the sentence, the easier to remember! Of course, there is more than one way to skin a cat, but the key point here is to have a method, any method, to aid your memory. You may decide to formulate a table of cases with the name, the point of law and the brief trigger fact, then use the table to help you memorise. I have given you such a table at the end of each chapter to get you started. You will also find useful websites in the 'further reading' section at the end of each chapter. As I said, there are many methods out there to help you learn how to memorise, but I can't stress enough how important it is to find and use a method which works for you.

I hope, having read this chapter carefully, that some of the 'fear' of studying land law may have been removed. Land law is certainly not just a 'historical' subject rooted in the feudal Middle Ages! It is, given the economic climate, perhaps now more than ever a living breathing subject, and one that I hope you will study, digest, understand, and even enjoy!

INTRODUCTION TO LAND LAW

SETTING THE SCENE

Oliver Cromwell, described land law in England as a *'tortuous and ungodly jumble'* and from its origins in 1066 until the start of the twentieth century, Cromwell's assessment was probably not far off the mark! Megarry and Wade suggest that English land law "...has tended to have an unenviable reputation for complexity". Echoing Cromwell, they suggest that "...this reputation was thoroughly deserved..." but since 1925, due to 'simplifying' legislation, they suggest that "...this is no longer the case." [See Further Reading below]. There are of course, many excellent text books which give a profoundly scholarly explanation of the history of land law. I have set down some of these texts in the 'Further Reading' section below. The purpose of *this* book will be to explain the workings of 'modern' English land law. However, it is always useful to set this in context. As such, a basic understanding of the historical background helps to set the scene. Just as a house will be in danger of subsidence without a solid foundation, the understanding of English land law can be undermined without some awareness of its roots.

Brief historical background – the Norman Conquest to the Law of Property Act 1925

History tells us that William the Conqueror landed in England in September 1066, and defeated the last Anglo-Saxon King, Harold, at the Battle of Hastings in October 1066. Prior to William being crowned King in Westminster Abbey on Christmas Day 1066, the previous Anglo-Saxon system of 'landholding' was far from "...easy to grasp and...expressed in a bewildering variety of formulae" according to Pollock and Maitland [see Further Reading] William I replaced the

entire system and imposed the *feudal system* where all land was *held* rather than owned – by way of **tenure** [from the Latin *tenere* ‘to hold’.] The idea behind this tenure is that land was ‘granted’ in return for various services – hence absolute ownership did not and could not exist. The owner of the land was of course, and theoretically still is, the Crown. There were a number of categories of tenure. These included:

- i. Knight service - agreement by the tenant to supply Knights for the monarch’s battles
- ii. Frankalmoin - agreement to provide spiritual services
- iii. Socage - agreement to provide agricultural services

See Figure 1.1

The process of land ‘re-distribution’ didn’t really begin in earnest until the 12th century, after the Domesday Book [completed in 1086] had compiled a detailed list of land ownership before and after the Conquest. This allowed the monarch to re-allocate land to a select band of Norman nobles in what Cooper refers to as the “*Norman land-grab*” [See below]. The families were known as “*tenants in chief*” but were also able to grant ‘sub-tenancies’ to use the modern term, known as the process of *subinfeudation*. The land could not be sold or bequeathed – the tenant was said to enjoy *seisin*; or **possession** of the land – a concept that is vitally important to understand even in the context of ‘modern’ land law. It was this ‘right of possession’ which could be protected, and not a right of ownership *per se*.

As time moved on, the Feudal system of **tenure** began to change. The statute of *Quia Emptores* in 1290 replaced *subinfeudation* with *substitution* where a new tenant could replace an existing one. By the 13th century *knight service* tenants paid money [*scutage*] rather than provide armed men. *Socage* and *Frankalmoin* were also on the decline, and land started to become a ‘commodity’ which could be transferred a little more easily. The *Statute of Wills* in 1540

allowed most land to be left in a will. By this time, a system of complex rights in and over land had started to be the norm, including the rights of ‘commoners’ to take profits from common land. These included;

- i. **Pasture**: the right to keep cattle, horses, sheep or other animals on the common land.
- ii. **Piscary**: the right to fish.
- iii. **Turbary**: the right to take turf.
- iv. **Pannage**: the right to feed pigs
- v. **Estovers**: the right to take wood

By the 17th century, especially after the Cromwellian ‘*interregnum*’ where royal estates were seized, land started to have a substantial commercial value. In 1660, the *Tenures Abolition Act* disposed of most forms of remaining tenures, and *The Inclosure Acts* of 1750-1850 allowed large plots of common land to be enclosed and put into the hands of private owners. By the 19th century land law had become extremely complex, with many large English estates held under ‘*strict settlement*’ – a legal mechanism, the primary purpose of which was to allow land to be kept within family [usually aristocratic] ownership. However, as the need to transfer land as a valuable commodity increased, reform started to take place, with the *Settled Land Act 1882* allowing for such ‘strict settlements’ to be sold. [see Chapter 6 – Trusts of Land and Appointment of Trustees Act 1996 finally ‘outlawed’ any new strict settlements from being created].

As the 20th century approached, land law was no longer a slave to its ancient feudal roots. Due to the needs of ‘modern society’ law reforms were put in place changing the way land was ‘owned’ and the way that ownership was recorded. Through *The Law of Property Act 1925*; *The Land Charges Act 1925* and the *Land Registration Act 1925*, the foundations of modern land law were laid.

Legal estates and interests in land – s1 Law of Property Act 1925

CORNERSTONE; *LEGAL OWNERSHIP OF LAND*

Prior to 1925, there were a number of ways in which a person could take legal 'ownership' of land. Of course, as stated above, this 'ownership' was really only a way of 'holding' the land – but with *almost* all of the rights of an absolute owner. The legal owner could sell the property, lease it to a tenant or sub-tenant, take a mortgage secured on the property, build and extend [within planning control laws] and even destroy the property if they so desired. It is also vital to understand that it is said that a 'legal right' in or over the land has the capability to '**bind the world**' - it may be binding on a third party due to its very nature as a 'legal right'. This is not the case with an **equitable** right [see below]. It must also be said that the right needs to be **proprietary** rather than **personal** for it to be binding on third parties [like successors in title or banks taking possession] This distinction will be dealt with in detail in Chapter 3.

Due to the fact that the Crown was [and is] the real owner, the 'ownership' or 'proprietary right' is that of an '**estate in land**' or an '**interest in or over land**' and prior to 1925 there were a number of these estates and interests in land capable of being 'legal' estates. After the Law of Property Act 1925, these were greatly reduced, and the key starting point post-1925 is the Law of Property Act 1925 s1 which sets down proprietary rights capable of being legal ;

s1 Legal estates and equitable interests.

(1)The only estates in land which are capable of subsisting or of being conveyed or created at law are—

(a)An estate in fee simple absolute in possession;

(b)A term of years absolute.

(2)The only interests or charges in or over land which are capable of subsisting or of being conveyed or created at law are—

(a)An easement, right, or privilege in or over land for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute;

(b) **A rentcharge** in possession issuing out of or charged on land being either perpetual or for a term of years absolute;

(c) A charge by way of **legal mortgage**;

(d). and any other similar charge on land which is not created by an instrument;

(e) **Rights of entry** exercisable over or in respect of a legal term of years absolute, or annexed, for any purpose, to a legal rentcharge.

(3) All other estates, interests, and charges in or over land take effect as equitable interests.

As explained above, the owner of the land holds an ‘estate’ or an interest in that land. As far back as *Walsingham’s Case (1573)* it was clear that “...*the land itself is one thing, and the estate in land is another thing, for an estate in the land is a time in the land, or land for a time, and there are diversities of estates, which are no more than diversities of time*”. The idea of holding the land for an *almost* indefinite time is borne out by the feudal doctrine of *escheat* which states that a ‘freeholder’ may ‘own’ their land until there are no longer any heirs or descendants who can take the property. At that point the Crown is said to take title to the property by ‘*escheat*’. This part of our feudal heritage, at least in theory, remains to the present day, with the Administration of Estates Act 1925 s46(1) (vi) allowing for property of an intestate deceased to ‘return’ to the Crown *bona vacantia* where no-one else is able to take the estate. Generally now, *escheat* only occurs where there is an estate subject to bankruptcy proceedings under the Insolvency Act 1986.

Legal estates prior to 1925

Prior to 1925 there were a number of ways in which to hold legal title. These were:

- i. **Fee simple** – this was tantamount to absolute ownership and could be sold or left in a will. This remains as a legal estate today as ‘*freehold ownership*’ [see below]
- ii. **Life estate** - this was an estate in land that as it suggests, lasted only as long as the life of the ‘owner’ of the land. Once they died, the property returned to the person or state of the grantor. This ‘estate’ can still exist – but only as a trust of land *in equity* [see below]
- iii. **Fee tail** – In 1285, the statute *De Donis Conditionabilis* allowed for a fee tail estate to be recognised as a legal estate in land. This term ‘tail’ derived from the French word *taille*, which suggests a limitation on inheritance of such an estate. Only direct male descendants [fee tail male] or female descendants [fee tail female] could take the land – clearly the aim being to keep the property within the family. Since 1925 however, these estates were also only recognised as equitable and since the *Trusts of Land and Appointment of Trustees Act 1996* no new fee tails can be created – they will simply be seen as a trust of land.

See Figure 1.2

Legal estates after 1925

As illustrated above, Section 1(1) of the *Law of Property Act 1925* has greatly simplified ‘legal ownership’. It reduced the number of estates capable of being ‘legal estates’ to just two:

- i. ***The fee simple absolute in possession***- s 1(1)(a)- this is more commonly known, especially in conveyancing terms, as **the freehold estate** – this equates to absolute ownership [with some limitations – see Chapter 2]
- ii. **The term of years absolute**- s1(1)(b)- this is known as the **leasehold estate** and is based on a certain or fixed time period for ownership ‘carved out’ of the freehold and

granted by the freeholder – at the end of that time period the property ‘*reverts*’ to the freehold owner.

TAKE NOTE

In relation to legal owners of a property, due mainly to the desire to ease conveyancing practice, s34(2) Law of Property Act 1925 states that there can be a maximum of 4 legal owners of a single piece of land.

The fee simple absolute in possession

Fee simple: This illustrates that the *grant* of the land is *inheritable* and as such is the closest to full ownership that is possible. Other than third party rights in and over the land, and such other restrictions found in planning laws and general laws of negligence and nuisance, the ‘fee simple’ suggests an almost unrestricted use of the land. In ***Walsingham’s Case*** it was stated that “‘...he who has a fee simple in land has a time in the land without end or the land for a time without end’ (1573). As such the ‘owner’ is said to hold the land freely – and therefore is the **freeholder** of that land.

Absolute: The word ‘absolute’ signifies that there should be no limitations placed on ‘fee simple’ ownership. Traditionally a fee simple could be ‘conditional’ or determinable’:

APPLICATION

The Conditional or Determinable Fee Simple:

Conditional:

“To Zyg on the condition that he becomes a stockbroker”

The grantor has the choice of whether to enforce a condition or not – and the condition may be void for being contrary to public policy. It is possible even today to have a legal estate based on a conditional fee simple [though rare] under s7(1) of the Law of Property Act 1925.

Determinable:

“To Zyg until he becomes a stockbroker”

Even though the ‘event’ may be the same as the event which forms the basis for a condition, if worded as ending the fee simple on the occurrence of such an event, it will be seen as a determinable fee simple and will only be an equitable estate in land, not legal. The right WILL end at the time Zyg becomes a stockbroker.

In possession: This simply means that the ‘owner’ must take immediate physical possession of the property, or be in ‘receipt of rents and profits’ – for example, as a landlord with a tenant in possession. The tenant will also have a legal estate – a **‘leasehold’** estate.

The term of years absolute

This is defined at s.205(1)(xxvii) LPA 1925 as an estate in land for a fixed; certain or ascertainable time period. It states that ‘years’ can also mean a time period of less than a year. If the property is purchased leasehold, then the freeholder holds the property *‘on reversion’* - that is the freeholder or freeholder’s estate will ‘take back’ the title of the property at the end of the time period. It is also possible of course for the ‘owner’ to ‘lease’ the property by creating a landlord-tenant relationship or for a leasehold tenant already ‘renting’ under a ‘lease’ to create a ‘sub-lease’ to a ‘sub-tenant’ for a period of time shorter than the original lease. [see Chapter 3]

TAKE NOTE

It is useful to understand here that in land law terminology 'leasehold ownership' can mean either that the leaseholder has purchased a property leasehold from the freeholder [for example on a 99 year lease] or they may be simply 'renting' from the freeholder with a tenancy agreement [see Chapter 3]

There is also a *third* form of ownership known as ***Commonhold*** which was introduced by the ***Commonhold and Leasehold Reform Act 2002***. However, this is really a sub-section of Freehold ownership, the idea being that the Commonhold interest is 'carved out' of an existing freehold estate, usually by a property developer of a new development, with the idea of creating individual 'commonhold' units that are owned by each unit holder, where the common areas are owned collectively by the '*commonhold association*'. The unit holders will be the registered owners of their individual units, whereas the common areas will be registered in the name of the 'association' collectively. The concept was born to solve old common law problems of the accountability of 'common parts' such as waste bin areas and staircases. Traditionally cases such as ***Liverpool City Council v Irwin 1977*** needed to rely on contractual implied terms to solve any disputes as to liability for these common areas. The 2002 Act sought to create a statutory regime which allows a '*commonhold association*', like a business organisation, to hold property registered in its name.

REFLECTION

Commonhold has been described as "*an unknown quantity*" which is still surrounded by "*nervousness*" due to this "*new legal arrangement along the lines of an American condominium*" needing full co-operation by a majority of the members of the 'association' who then share the full costs of repairs and maintenance .[See further reading below]. Selling Commonhold units has been described by Smytherman as "*like trying to sell seats on the first test flight of a new prototype airliner, with...the pilot being a student [on] his first solo flight*" [see below]

Legal interests after 1925

As explained above section 1(2) of the *Law of Property Act 1925* sets down five categories of interests that are **capable** of being legal interests. It is important to understand that they are not *automatically* legal interests however – generally, if not created in accordance with the relevant formalities [usually by deed – see Chapter 3] then they may be equitable interests rather than legal [see below].

INTERSECTION

A full discussion of the creation and protection of the two key interests in land capable of being legal can be found in their own substantive chapters: easements can be found in Chapter 8; Mortgages can be found in Chapter 10. It is not necessary to deal with the substantive law on easements or mortgages here.

Easements : s1(2)(a) LPA 1925

This section states that an ‘easement, right or privilege’ which is ‘equivalent to an estate in fee simple absolute in possession [freehold] or for a term of years absolute’ [leasehold] can be a legal interest. This means that it must be for ever [like a freehold interest] or for a fixed, certain or ascertainable time period [like a leasehold]. However, for an easement to be ‘legal’ it must also be created by deed following the formalities at s52(1) LPA 1925.

Mortgages : s1(2) (c) LPA 1925

Once again, if the relevant formalities are satisfied [see Chapter 10] and the mortgage is a ‘legal charge’ created by deed, then the mortgage is also a key interest in land that is capable of being [and nearly always will be] a legal interest.

Rights of Entry: s(1)(2)(e) LPA 1925

This is the right of re-entry onto the land in default of a rent-charge [see below – of historical interest only] or the right of a landlord to re-enter a property where a tenant is in breach of a tenancy covenant such as a repair obligation or non-payment of rent.

TAKE NOTE

The Right of entry of a landlord is dealt with thoroughly in the specific study of Landlord and Tenant Law but is outside of the remit of this book.

Rent Charges : s1(2)(b): Miscellaneous Charges : s1(2)(d)

The ‘rent charge’ was traditionally a payment of money for the use of [usually agricultural] land rather than a ‘normal’ rent. However, since the introduction of the Rent Charges Act 1977, no new rent charges could be created - and as such, this ‘interest’ is of historical interest only. This is also true of the ‘*miscellaneous charges*’ at s1(2)(d) LPA 1925.

It is important to understand that all of the estates and rights listed at s1 LPA 1925 are **capable** of being legal proprietary interests - that is, legal interests in or over the land itself.

INTERSECTION

A detailed explanation of the difference between purely personal rights – such as that of a ‘licence’ which gives permission for you to be on someone else’s land and prevents you from being a trespasser – and proprietary rights – rights in or over the land itself – is given at Chapter 3. It is VITAL to understand that only proprietary rights, legal **or** equitable are capable of binding a third party.

The meaning of equity and equity's role in land law; equitable interests.

s1(3) LPA 1925 – All other proprietary interests: *equitable only*

The LPA 1925 at s1(3) states that all other rights, not listed at s1, are proprietary rights that can **only ever be equitable** rather than legal. These will generally be dealt with in substantive chapters on each interest, but it is useful to list them here:

- i. Beneficiaries interests under a trust of land
- ii. Restrictive Covenants
- iii. Proprietary Estoppel Rights
- iv. Estate Contracts

As stated above though, it is also perfectly possible to have an equitable easement; lease or mortgage - especially where the formalities at s52 LPA 1925 – creation by deed – have not been satisfied. If the interest is not created by deed, then provided it satisfies the formalities requirements at s53(1)(a) LPA 1925 (in writing and signed) or the alternative requirements at s2 of the Law of Property (Miscellaneous Provisions) Act 1989 [see Chapter 3 for details] then the proprietary interest will be **equitable** and may still be binding on a third party. It is vital therefore to understand exactly what 'equity' means and to understand the role equity plays within land law.

Equity – a brief history

For a thorough understanding of the ‘birth’ and development of Equity within English Law, there are many textbooks available on Equity and Trusts [*including the Blueprints textbook on the subject*]. However, to understand land law fully, as suggested above, it is vital to have a working knowledge of how equity ‘fits in’ to the overall operation of land law.

In 1066, when the common law was introduced to England by William the Conqueror, if a claim was to be brought [a writ] then it was brought before the King’s court. This process allowed for limited remedies, such as the equivalent of damages – but if there was no writ, there was no real remedy. The *Provisions of Oxford 1258* restricted any writs being brought without permission of the King. However, as the workload increased, and a realisation that the common law was proving rather rigid and inflexible, some ‘writs’ were handed over to the Lord Chancellor who was said to act as the “keeper of the King’s Conscience”. The Lord Chancellor eventually set up the Courts of Chancery and dealt with petitions based on the merits of each particular case and decided on principles of fairness and justice – hence equity. It is also said that ‘*equity acts in personam*’ to enable a personal claim to be brought against a defendant rather than just a common law action *in rem* focussing on the ‘*thing*’ – the property itself.

Apart from allowing more diverse claims to come before the Chancery court, equity also allowed for different remedies such as specific performance and injunctions.

INTERSECTION

In Chapter 9, the equitable proprietary right of a ‘restrictive covenant’ is discussed in detail. Although the common law remedy of damages is available [see below] should your neighbour breach a covenant, money is not really the general aim. For example, if the agreement was to prevent your neighbour using their land as commercial property, a money remedy will not really suffice. As covenants are equitable,

equity allows the equitable remedy of injunction – to stop the land being used for a purpose outside of the covenant. However, The Senior Courts Act 1981 at s50 also expressly allows for common law remedies such as damages to be awarded in place of an equitable remedy. [See Chapter 9 – **Jaggard v Sawyer 1995** – where damages were awarded for a breach of covenant]

As time went on, the King's Court [common law] and the Chancellor's Court of Equity worked independently. A claimant would need to decide whether the common law or equity would provide the better solution. The common law gave certainty, but equity gave flexibility. In the **Earl of Oxford's Case (1616)** the conflict came to a head with the ruling that where there was a clash between the common law and equity – 'equity should prevail'.

As equity developed further, the Lord Chancellor gave his judgment based not on precedent, but based on the Chancellor's own, often moral, opinion. In the 17th century, the respected jurist John Selden proclaimed that the outcome of a case heard in the Chancery Courts of equity was totally unpredictable as "*equity varies with the length of the Chancellor's foot*". As a response, Lord Nottingham, the Lord Chancellor at the time, introduced a more 'rule-based' system to attempt to create a little more certainty. Through the **Judicature Acts 1873-75** the courts of common law and the courts of equity finally merged with claimants being able to plead common law cases but heard with equitable principles being applied if relevant. In **Pugh v Heath 1882** it was stated that a court "*...is now not a Court of Law or a Court of Equity, it is a Court of complete jurisdiction...*" although s25 Judicature Act 1873 stated quite clearly that where there was a conflict between common law and equity, equity will prevail. This is also now found in the Senior Courts Act 1981 s49(1).

TAKE NOTE

The Senior Courts Act 1981 is the 'renamed' Supreme Courts Act 1981 – the content is unchanged – only the name was changed after the Constitutional Reform Act 2005 established the Supreme Court of the United Kingdom [the 'replacement of the appellate House of Lords] on October 1 2009. The name of the Supreme Courts Act 1981 was changed to avoid any confusion.

Equity's role in land law

As stated earlier, the common law only recognises legal title – any other rights are not recognised. The role of equity therefore, is to 'step in' to recognise the equitable rights of owners and/or third parties. As such, those proprietary rights not listed at s1 LPA 1925, or proprietary rights that have not been created in satisfaction of the formalities remain as equitable rights – and it is only due to the existence of equity that these rights are recognised and can be enforced. These rights include beneficial interests under a trust of land; restrictive covenants; estate contracts and estoppel rights. They also include equitable leases, easements and mortgages if formalities have not been met.

INTERSECTION

Each of these key equitable rights will be discussed in detail in the following chapters:

Equitable leases; chapter 3

Estate Contracts; chapter 4

Beneficiaries interests under a trust of land: chapters 5 and 6

Proprietary Estoppel Rights; chapter 7

Equitable easements; chapter 8

Restrictive Covenants ; chapter 9

Equitable mortgages; chapter 10

The ‘enforceability’ of equitable rights in land law

As explained above, in relation to enforcing a right, the traditional difference between common law and equity was the remedy available. However, this has now merged under s50 Senior Courts Act 1981. Traditionally the other major difference between a common law right and an equitable right was that common law rights were ‘attached to the land not the owner’ and as such would ‘run with the land’ binding successors in title whereas a person claiming an equitable right in the land, prior to 1925 especially, could be defeated by ‘*equity’s darling*’ or the ‘*bona fide purchaser for value without notice*’. Put simply, this meant that if you were claiming an equitable right, your ‘opponent’ could challenge that right by arguing that they had bought the land in good faith [*bona fide*] for some *value* [though not necessarily market value as ‘consideration needs to be sufficient but not necessarily economically adequate – a general principle of the contract law rules of consideration] and without any knowledge of your right being in existence [*without notice*]. This was seen as an “*absolute, unqualified, unanswerable defence*’ against a person claiming an equitable right [James LJ in *Pilcher v Rawlins 1872*]. However, this ‘doctrine of notice’ as it was called, only really applied to **unregistered land** – as with the advent of *Registered land* with the introduction of the Land Registration Act 1925, the ‘doctrine of notice’ was effectively replaced with the presumption of knowledge of a pre-existing interest if it appears on the property register [see Chapter 4] or the presumption of an interest which overrides the register [see also chapter 4]. At s198 LPA 1925, it states that the entry of an interest on the property register is ‘*deemed actual notice*’ of that interest. Hence ‘*equity’s darling*’ and the doctrine of notice, has “*no application in registered land*” [LJ Mummery in *Barclays Bank v Boulter [1998]* and as unregistered land is virtually consigned to history, ‘*equity’s darling*’ and ‘*notice*’ only remain as a *principle* in registered land – the mirror principle [see Chapter 4] - which suggests that all interests on the property register should reflect the reality of ownership.

TAKE NOTE

As Unregistered land is largely now historical, with around 96% of all land in England and Wales being registered, this textbook will refer fleetingly to unregistered land – the detail of Unregistered or ‘traditional’ conveyancing is unnecessary. As such, this book will focus almost entirely on land law in a ‘registered land’ context. However – some basic background can be found below.

Brief introduction to the concept of registered and unregistered land.

Prior to 1925, most of the land in England and Wales was ‘unregistered’ – it was only with the introduction of a major system of land registration under the *Land Registration Act 1925* that land began to be ‘registered’. It is vital to understand that this Act has been repealed and replaced with the *Land Registration Act 2002*. [see Chapter 4 for a detailed discussion and explanation of the LRA 2002 and how it operates.] The general idea is that with **registered land** there is ONE document known in conveyancing terms as the Official Copy of the Register – and this is the document which will be the subject of a ‘search’ by your conveyancer or solicitor [or of course, yourself] when purchasing a property. The ‘mirror principle’ referred to above suggests that this one document is a true reflection of all pre-existing rights and interests that are attached to the land you are purchasing. The only ‘crack in the mirror’ as Professor Martin Dixon puts it [see below] are the ‘interests which override’ the register but may still be binding on a new purchaser or a bank taking possession [see Chapter 4].

See Figure 1.3

The problem with **unregistered land** however, is that a new purchaser did not have the ‘luxury’ of perusing one single document. The purchaser would have to search through a number of ‘title deeds’ going back at least 15 years to satisfy the requirement that they had what was

referred to as a 'good root of title' [s23 *Law of Property Act 1969*]. They would also need to check the Land Charges Register which under the *Land Charges Act 1972*, they would be able to see the entry of certain equitable interests such as covenants; easements; mortgages; estate contracts and matrimonial rights of occupation. These were [are] known as Land Charges and if registered were deemed to give 'actual notice' – s198 LPA 1925 – see above. If the rights were not entered they could still bind under the 'doctrine of notice' [see above] but certain equitable rights could also be overreached – where the proprietary right [usually a beneficiary under a trust] could be replaced with a monetary payment. [see *Kingsnorth Finance v Tizard 1986*] Overreaching still plays a major role in Registered land and this will be discussed later. [see Chapter 4]. Hence, with unregistered land, an entry not on the Land Charges Register, especially of an equitable interest, would generally not be binding against a third party as it would be defeated by '*equity's darling*' :

APPLICATION

Midland Bank v Green 1981

Farmer Green owned a farm estate [unregistered land] worth approximately £40,000. He agreed with his son Geoffrey that Geoffrey could take an 'option to purchase' the farm at any time within the next 10 years. This agreement – an equitable proprietary right in the form of an estate contract - was backed up by consideration with Geoffrey paying a nominal amount for the agreement in order to make it legally binding. 6 years into the 10 year period Geoffrey introduced his wife-to-be to his father who disapproved of his choice of partner. To avoid the farm falling into the hands of his son and his wife, Farmer Green transferred the farm to his own wife Evelyne for the sum of £500. The question for the court was whether the estate contract should be enforced as a pre-existing equitable interest or did Evelyne defeat the claim by being 'equity's darling'.

At first instance, Oliver J found that she was the 'bona fide purchaser of a legal estate, for value, without notice' and as Geoffrey had failed to register the estate contract as a Class C(iv) Land Charge it was invalid under s13(2) LCA 1925. In the Court of Appeal however, Lord Denning MR found in favour of Geoffrey – arguing that she had not given 'money or money's worth' for the purchase - £500 being a

‘gross underpayment’. The House of Lords reminded Lord Denning that ‘consideration need not be economically adequate’ and restored the findings of Oliver J. The House made it very clear that if a person has an interest that needs to be entered on the register to bind a third party – especially an equitable interest – then it will be void if not entered on the register. The Farmer’s wife was indeed the bona fide purchaser for ‘money or money’s worth’, and due to the lack of an entry on the register, was indeed also ‘without notice’

As stated above though, the remainder of this book will focus on Registered Land, though the principles behind the ‘traditional’ system of conveyancing, and even those of the feudal system, still play their part in the study and operation of ‘modern land law’.

REFLECTION

As such, a proprietary right in or over the land, whether legal or equitable, is a valuable commodity, not least because it may have the effect of binding a third party. Although traditionally unravelling these proprietary rights from the ‘*ungodly jumble*’ may well have been ‘*tortuous*’, according to Megarry [see below] , thanks to the 1925 legislation, “*the structure of modern land law...*” helps to “*ease the burden on purchasers without defeating the interests of others unfairly.*”

KEY POINTS

- ‘Modern’ land law has its roots in the Feudal system of ‘tenures’ introduced by William the Conqueror after the Battle of Hastings. The Crown owned all land but gave land to ‘hold’ in return for various services to the monarch.

- The Feudal system was eventually replaced by a system of land ownership which included various ‘legal estates’ in land such as the fee simple; the life estate and the fee tail.

-
- The number of legal estates in land and interests over land were greatly reduced and simplified by the LPA 1925. The two remaining estates capable of being 'legal' are the 'freehold' and 'leasehold' estates and the key interests are the easement; the mortgage and the right of re-entry by a landlord. These rights and estates are capable of being 'legal' if they satisfy formality requirements – such as being created by deed
-

- All other proprietary interests or rights [s1(3) LPA] are only ever equitable. These include the covenant; the beneficiaries interests under a trust of land; the proprietary estoppel interest; and the estate contract. If formalities are not satisfied, then there can also be an equitable lease; mortgage and easement.
-

The role of equity within land law is to allow for different remedies such as specific performance and injunctions] but also serves to recognise rights that are not recognised by the common law – especially the rights of beneficiaries under a trust.

Courts of Equity sprang up alongside the King's courts from the time of William I – to allow more flexibility – and at the time of the Judicature Acts 1873-5 the two courts merged with equity prevailing where there was a conflict with the common law.

Traditionally an equitable claim could be defeated by 'equity's darling' but this was based on the 'doctrine of notice' which is largely historical since the introduction of Registered Land. Legal rights are attached to the land and are said to 'run with the land' to bind all future third parties.

Registered land is now the system used for conveyancing in England and Wales – around 96% of all land is Registered. This allows a purchaser to search one document containing all pre-existing proprietary rights – except those which override the register – the Official Copy of the Register. If a purchaser buys unregistered land they must search back through numerous documents to find a ‘good root of title’ going back at least 15 years. They must also check the Land Charges Register for any equitable land charges.

This textbook will focus on Registered Land only – though the principles behind unregistered conveyancing are still relevant.

Core cases and statutes

Case	About	Importance
<i>Walsingham’s Case 1573</i>	Historical overview of land ownership	The ownership is ‘in the land’ for a period of time – NOT the full ownership of the land itself – which is held by the Crown.
<i>Midland Bank v Green 1981</i>	Wife pays her husband farmer £500 for a farm worth £40,000 in ‘breach’ of an equitable estate contract held by their son.	If an interest is not entered on the register [and not an overriding interest] then the interest will be void against 3 rd parties as that third party has no ‘notice’ of the interest. Traditionally, in unregistered land, an unprotected right will be defeated by ‘equity’s darling’

Statute	About	Importance
<i>LPA 1925 S1(1)</i>	Sets down at 1(1) the two remaining legal estates in land	Freehold and Leasehold
<i>S1(2)</i>	S1(2) gives the interests capable of being legal	Easements; Mortgages and rights of Re-entry
<i>S1(3)</i>	S1(3) sets down that all other proprietary rights are only ever equitable	These include covenants; proprietary estoppel rights; beneficiary interests under a trust; estate contracts All of the rights at s1(1) and (2) will only be equitable if the formalities for creation [deed] are not satisfied.

Further reading

Megarry & Wade; The Law of Real Property; 7th edition, 2008, Thomson [ed. Martin Dixon]

The 'bible' when it comes to a detailed 'practitioner' account of land law

Megarry's Manual of the Law of Real Property; 8th Edition, Sweet & Maxwell 2002

As above – a practical and detailed approach to the subject of land law

Scrutton, Sir Thomas Edward, (1885) : “Land in fetters; or, The history and policy of the laws restraining the alienation and settlement of land in England”

<http://books.google.co.uk/books?id=0wQ9AAAAIAAJ>

Gives the history of land law – especially the feudal system of landholding

***Sir Fredrick Pollock and F.W. Maitland; “The history of English law before the time of Edward I”
; second edition, 1898***

As above – this gives great historical detail of the medieval system of land holding

Cooper, A; “Extraordinary privilege: the trial of Penenden Heath and the Domesday inquest”, The English Historical Review, 1 November 2001

More historical context – useful for background understanding

Clark, R; “Leasehold has us tied in chains” The Telegraph Jan 2006 www.telegraph.co.uk/property

A critical account of leasehold ownership

Smytherman, B; ‘What’s the future for Commonhold’ The Property Network March 14 2010

www.network.propertyweek.com Critique of the ‘commonhold’ innovation created by the Commonhold

and Leasehold Reform Act

Appendix v - The Immigration Act 2014 Journal Article

The Immigration Act 2014: "Not on the list you're not coming in; landlords forced to discriminate" Elliot Schatzberger [2015] *Conveyancer and Property Lawyer* 395, Issue 5, November 2015

The Immigration Act 2014; 'Not on the list you're not coming in; Landlords forced to discriminate'

Abstract

A critical assessment of the Immigration Act 2014 requirements for landlords of private residential accommodation to conduct checks to establish that new tenants have the 'right to rent' in the UK.

The number of 'illegal immigrants' living in the UK has long been seen as a political 'hot potato' with politicians on one side of the spectrum using the immigrant as a 'political football' and on the other side, afraid to engage. Until now that is. The Immigration Act 2014 came into force on May 14th 2014, with the objective of imposing mandatory 'immigration status' checks by landlords on residential tenants with 'Residential Tenancy Agreements' of less than 7 years, due to come into force in full during 2015. [Sections 20-37]

Government ministers, including James Brokenshire, the Immigration minister at the time of the implementation, claims that the checks will, "*make it more difficult for immigration offenders to stay in the country....*" and will benefit "*...those communities blighted by illegal structures and overcrowded houses*"¹. Perhaps more unapologetically, Theresa May stated quite categorically that the purpose of the new Act, including sections 20-37, was to create a 'hostile environment' for migrants coming to and living in the UK.²

This paper will seek to critically analyse the new provisions and draw conclusions as to whether these provisions are likely to provide a tangible benefit, or whether at best they suffer from a complete 'lack of clarity'³ or at worst the '...inter-coalition conflict and widespread concern...' for 'ethnic minorities and migrant communities' was wholly justified.

¹ www.gov.uk

² www.theguardian.com/politics/2013/oct/10

³ O'Callaghan, D [2015] *'Immigration Act 2014; Creating a hostile environment – the Act as a weapon'* www.landmarkchambers.com

In the dark days of the 1960's, before the raft of anti-discrimination legislation in the following decade, it would not be surprising to see signs adorning landlords' windows and doors brazenly stating "No Blacks, No Dogs, No Irish". Bigotry and 'overt racism' had no need for subtlety, as McCleod puts it, "...it was allowed to roam free and unashamed"⁴. With legislation such as the Race Relations Act 1976, the Human Rights Act 1998 and the more recent Equality Act 2010, all of this seemed to be consigned to the dustbin of legal history, until however the "rancid debate"⁵ which introduced the Immigration Bill, which became the Immigration Act 2014 after receiving Royal Assent on May 14 2014. This Act potentially has the effect of, according to Baroness Lister, "...diminishing us all..." by plunging us back into the "...stinking gutter of xenophobia"⁶.

The Bill

When the Bill was published, Home Secretary Theresa May stated categorically that it was designed to "...create a really hostile environment for illegal migrants"⁷. Though trying to "...choose her words with feline delicacy" this "...uncharacteristically vivid" language formed the backdrop to the provisions lurking within the new Bill.⁸ Throughout a rigorous consultation period, the Bill was described by its opponents as a "...proposal [which] smacks of political posturing rather than a seriously thought through policy..." the result of which will be to impose such a burden on landlords that they may well end up as "...scapegoats for the UK Border Agency's failings"⁹. Barrister Declan O'Callaghan points out that the Bill [and subsequent Act] "...deliberately identifies 'soft' targets and will be used as a 'weapon' which may result in

⁴ McCleod, M (2013) "Theresa May's immigration bill is a valuable tool for racist landlords", The Guardian, Tuesday 15 October 2013

⁵ Baroness Lister of Burtersett [2014] 2Immigration Bill – Second Reading", Hansard, House of Lords debate 10 February 2014.

⁶ Ibid

⁷ Kirkup, J and Winnett, R [2012] "Theresa May interview: We're going to give illegal migrants a really hostile reception" The Telegraph, 25 May 2012

⁸ Ibid

⁹ Renshaw, R [2013] citing Alan Ward, Chairman of the Residential Landlords Association, "Immigration Bill's proposals slammed as 'reckless'" Letting Agent Today, 17 October 2013 www.lettingagenttoday.co.uk

'discriminatory lettings'.¹⁰ O'Callaghan explains that the "...complicated immigration and residence status..." checks as required by the Act, under sections 20-37, may lead to landlords turning away ethnic minority tenants "regardless of their status"¹¹.

Robinson and Ogilvie of Liberty¹² do not mince their words. The provisions of the Bill, they say in their report for the Committee Stage Briefing on Part 3, Chapter 1 of the Bill¹³, are "...offensive unworkable and will lead to discrimination..." and, echoing Alan Ward the Chairman of the Residential Landlords Association, suggest that as the "...failing immigration service continues to flounder..." the Governments' aim to outsource certain immigration controls to private citizens is no more than an "...abdication of responsibility"¹⁴.

They go on to say that the 'folly' of the landlord checks requirements was "laid bare in numerous powerful contributions" across party lines during the Second Reading debate, by Peers such as Baroness Smith, and Lords Rosser, Stevenson and Best, and they reiterated Baroness Hamwee's concern in regards to the initial proposed pilot scheme, that this should not be "...simply the first phase of a predetermined rollout"¹⁵. The authors at length illustrate the salutary tale of Mark Harper, the former Immigration Minister who in his own words "took the Immigration Bill through Parliament in autumn 2013"¹⁶. Harper was compelled to resign after failing to carry out proper and thorough checks as to the employment 'right to work' checks in relation to his cleaner, eventually discovering that the cleaner "did not in fact have indefinite leave to remain"¹⁷. Robinson and Ogilvie seem only too eager to point out that this 'discovery' and resignation occurred just prior to the Second Reading of the Bill, and appositely demonstrates the total "...unworkability of in-country, layperson, immigration control..." where despite "...assiduous efforts...with expert guidance and support at his disposal..." Harper was unable to accurately determine the immigration status of his employee. They argue

¹⁰ O'Callaghan, D [2015] "Immigration Act 2014 Creating a hostile environment – the Act as a weapon" www.landmarkchambers.co.uk

¹¹ Ibid page 11

¹² The National Council for Civil Liberties

¹³ Relating to the subject of this paper – residential tenancies

¹⁴ Robinson, R and Ogilvie, O [2014] "Liberty's Committee Stage Briefing on Part 3, Chapter 1 (residential tenancies) of the Immigration Bill in the House of Lords" Liberty80, www.liberty-human-rights.org.uk

¹⁵ Ibid

¹⁶ Cited by Robinson and Ogilvie

¹⁷ Ibid

that as such, it is wholly “...inconceivable that millions of landlords, with no expertise or experience of immigration law, will fare any better”¹⁸

On May 12 2014, as part of the final ‘ping pong’ stages of the Bill’s passage, it was debated further in the House of Lords. Even with the rhetoric on all sides, even with the ‘inter-coalition conflict and widespread concern... for ethnic minorities and migrant communities’ the Bill emerged ‘relatively unscathed’¹⁹. It was confirmed however, that there would be a pilot in one geographical area – the West Midlands – an area ‘big enough to allow for a proper evaluation before national roll-out’. It was also confirmed that some concessions had been reached such as exemptions on the tenant status tests for lettings to students, homeless hostels, and refuges for female victims of violence and for other ‘vulnerable people in immediate need’ along with a ‘Home Office hotline’ and a consultative group [including the Residential Landlords Association] to advise on legislation and codes of practice.²⁰ It seems though, that the concern voiced by Baroness Hussein-Ece at the Second Reading, that “...we could well end up with a situation of ethnic profiling....damaging to race relations and community cohesion...”²¹ failed to make a significant impact. However, it is also rather telling that one of the concessions by the time the Bill received Assent was to require the Home Secretary to produce an accompanying Code of Practice as to how landlords should avoid a breach of the Equality Act 2010. Robinson and Ogilvie point out that this “...tacitly accepts that the policy will encourage unlawful discrimination”²².

The Bill received Royal Assent on May 14 2014, and amongst the “...77 clauses...designed to make fundamental changes to our immigration system...”²³ the requirements for a residential landlord to carry out immigration status checks [ss20-37] came into force on December 1 2014 with the promise by Immigration and Security Minister James Brokenshire, that the measures would be “introduced quickly and effectively”²⁴.

¹⁸ Ibid

¹⁹ Grove-White, R [2014] “What you need to know about the Immigration Bill” Migrant Rights Network, www.migrantrights.org.uk

²⁰ Ibid

²¹ Hansard, 10 February 2014: Column 494

²² Robinson, R and Ogilvie, O [2014] “Liberty’s Committee Stage Briefing on Part 3, Chapter 1 (residential tenancies) of the Immigration Bill in the House of Lords” Liberty80, www.liberty-human-rights.org.uk

²³ Brokenshire, J [2014] ‘Immigration Bill becomes law’ Home Office 14 May 2014 www.gov.uk

²⁴ Ibid

The Law

The relevant provisions relating to the residential landlord immigration checks can be found at Part 3 Chapter 1, and at Section 20 begin by defining a ‘residential tenancy agreement’. Section 20 is as follows:

20 Residential tenancy agreement

(1) This section applies for the purposes of this Chapter.

(2) “Residential tenancy agreement” means a tenancy which—

(a) grants a right of occupation of premises for residential use,

(b) provides for payment of rent (whether or not a market rent), and

(c) is not an excluded agreement.

(3) In subsection (2), “tenancy” includes—

(a) any lease, licence, sub-lease or sub-tenancy, and

(b) an agreement for any of those things,

and in this Chapter references to “landlord” and “tenant”, and references to premises being “leased”, are to be read accordingly.

.....

It is perhaps instantly noteworthy, and supports the ‘lack of clarity’ suggested by O’Callaghan, that a ‘tenancy’ for the purposes of this Act ‘includes’ a licence. It was Lord Hoffman in the now ‘infamous’ ruling in the case of *Bruton*²⁵ who was subsequently criticised for blurring the lines between a lease and a licence, creating the ‘non-proprietary lease’.²⁶ As purely a side –issue, but right from the outset, Section 20(3)(a) seems to at least potentially add fuel to the fire beneath the ‘feudal phoenix’²⁷ by including ‘lodgers’ as tenants. It is also abundantly clear though, that this is no simple drafting error. To include ‘tenants’ under a licence agreement – though a legal misnomer in itself – means that landlords - even resident landlords - will be unable to revert back to the pre-*Street v Mountford* position where landlords could label agreements ‘licences’ to circumvent the statutory strictures of Rent Act legislation²⁸. There will be no room for manoeuvre here. Landlords will be caught by s20 whether

²⁵ *Bruton v London Quadrant Housing Trust* [1999] All ER 481

²⁶ Pawlowski, M [2005] ‘The Bruton Tenancy – clarity or more confusion?’ *Conv.* 2005 May/June 262-270

²⁷ Dixon, M [2000] ‘The non-proprietary lease: the rise of the feudal phoenix’ *C.L.J.* 2000, 59(1) 25-28

²⁸ As Lord Templeman illustrated in *Street v Mountford* [1985] AC 809

the tenancy *is* a tenancy or whether it is a licence provided the tenant occupies the property as their ‘only or main home’. Even *this* is highly problematic as the factual analysis of whether it is a *de facto* ‘only or main home’ “will be decided on a case by case basis”²⁹. The Code of Practice, rather remarkably, also points out that if the Landlord’s own ‘adult child’ after studying or working abroad returns to the family home and pays towards their ‘board and lodging’ [hence becoming a lodger] it is also “advisable to conduct right to rent checks” on that family member if the landlord/parent is in any doubt as to their immigration status!³⁰

It is however, s21 which begins to set out the persons ‘disqualified’ for occupying under such a ‘residential tenancy agreement’. In the words of Hyatt, it seems that anyone with a ‘precarious’ immigration status may be ‘disqualified’.³¹ Section 21 is set out as follows:

21 Persons disqualified by immigration status or with limited right to rent

(1) For the purposes of this Chapter, a person (“P”) is disqualified as a result of their immigration status from occupying premises under a residential tenancy agreement if—

(a) P is not a relevant national, and

(b) P does not have a right to rent in relation to the premises.

(2) P does not have a “right to rent” in relation to premises if—

(a) P requires leave to enter or remain in the United Kingdom but does not have it, or

(b) P’s leave to enter or remain in the United Kingdom is subject to a condition preventing P from occupying the premises.

(3) But P is to be treated as having a right to rent in relation to premises (in spite of subsection (2)) if the Secretary of State has granted P permission for the purposes of this Chapter to occupy premises under a residential tenancy agreement.

(4) References in this Chapter to a person with a “limited right to rent” are references to—

(a) a person who has been granted leave to enter or remain in the United Kingdom for a limited period, or

²⁹ Home Office [2014] ‘Code of Practice on illegal immigrants and private rented accommodation – Civil Penalty Scheme for Landlords and their Agents’ www.gov.uk. It should also be noted that the provisions do not apply to a lease of over 7 years.

³⁰ Ibid at Paragraph 3.6

³¹ Hyatt, T [2015] ‘Residential landlords and obligations under the Immigration Act 2014’ Invictus Chambers www.invictuschamberslondon.co.uk

(b) a person who—

(i) is not a relevant national, and

(ii) is entitled to enter or remain in the United Kingdom by virtue of an enforceable EU right or of any provision made under section 2(2) of the European Communities Act 1972.

(5) In this section “relevant national” means—

(a) a British citizen,

(b) a national of an EEA State other than the United Kingdom, or

(c) a national of Switzerland.

The ‘right to rent’

As such, the new provisions as s21 may be summarised as essentially ‘creating’ three ‘classes’ of potential tenant defined entirely by their immigration status. Firstly - those with an unlimited ‘right to rent’, including British citizens, EEA and Swiss nationals, or persons with a right of abode or indefinite leave to remain. Secondly – persons with a ‘limited right to rent’ such as persons entitled to enter or remain in the UK due to their European Union status, or those who may have been granted leave to enter or remain for a limited time period. Thirdly, persons who have ‘no right to rent’ - namely persons who require permission to enter or remain but do not have such permission, or persons whose permission to enter or remain is subject to a condition preventing them from occupying a premises.

The Refusal

As such, the residential landlord must not lease any premises to a ‘*disqualified adult*’ under the provisions set down at section 22:

22 Persons disqualified by immigration status not to be leased premises

(1) A landlord must not authorise an adult to occupy premises under a residential tenancy agreement if the adult is disqualified as a result of their immigration status.

(2) A landlord is to be taken to “authorise” an adult to occupy premises in the circumstances mentioned in subsection (1) if (and only if) there is a contravention of this section.

(3) There is a contravention of this section in either of the following cases.

(4) The first case is where a residential tenancy agreement is entered into that, at the time of entry, grants a right to occupy premises to—

(a) a tenant who is disqualified as a result of their immigration status,

(b) another adult named in the agreement who is disqualified as a result of their immigration status, or

(c) another adult not named in the agreement who is disqualified as a result of their immigration status (subject to subsection (6)).

(5) The second case is where—

(a) a residential tenancy agreement is entered into that grants a right to occupy premises on an adult with a limited right to rent,

(b) the adult later becomes a person disqualified as a result of their immigration status, and

(c) the adult continues to occupy the premises after becoming disqualified.

(6) There is a contravention as a result of subsection (4)(c) only if—

(a) reasonable enquiries were not made of the tenant before entering into the agreement as to the relevant occupiers, or

(b) reasonable enquiries were so made and it was, or should have been, apparent from the enquiries that the adult in question was likely to be a relevant occupier.

(7) Any term of a residential tenancy agreement that prohibits occupation of premises by a person disqualified by their immigration status is to be ignored for the purposes of determining whether there has been a contravention of this section if—

(a) the landlord knew when entering into the agreement that the term would be breached, or

(b) the prescribed requirements were not complied with before entering into the agreement.

(8) It does not matter for the purposes of this section whether or not—

(a) a right of occupation is exercisable on entering into an agreement or from a later date;

(b) a right of occupation is granted unconditionally or on satisfaction of a condition.

(9) A contravention of this section does not affect the validity or enforceability of any provision of a residential tenancy agreement by virtue of any rule of law relating to the validity or enforceability of contracts in circumstances involving illegality.

(10) In this Chapter—

- “post-grant contravention” means a contravention in the second case mentioned in subsection (5);

- “pre-grant contravention” means a contravention in the first case mentioned in subsection (4);
- “relevant occupier”, in relation to a residential tenancy agreement, means any adult who occupies premises under the agreement (whether or not named in the agreement).

In as simple terms as possible, there are two possible contraventions of the provisions here – known as *pre-grant contraventions*, and *post-grant contraventions*. The former can best be described as when the landlord enters into a tenancy agreement to someone in the ‘third category’ - someone with ‘no right to rent’. The latter occurs when a person with limited right to rent subsequently *becomes* disqualified but continues to occupy. Hence the reality is that the landlord does not just have an obligation to check at the start of a tenancy, but to ‘keep a close eye’ on their tenant’s immigration status as an ongoing concern. As Hyatt rightly suggests, landlords must also ensure that their tenant’s ‘right to occupy’ does not ‘lapse’ – a burden which suggests that landlords must “...keep a record of their tenant’s status and preserve documentation of their efforts...”³² or face the civil penalty of up to £3000 as set down by s23 of the Act unless they can demonstrate that an agent is responsible for the contravention rather than themselves [under s24-25]. It should be noted that there are many other ‘nuggets’ within the provisions, outside of those discussed here, such as that at section s23(3)(b) which sets down that ‘successor landlords’ may also shoulder the liability for a post-grant contravention:

23 Penalty notices: landlords

(3)“Responsible landlord” means—

- (a)in relation to a pre-grant contravention, the landlord who entered into the residential tenancy agreement;
- (b)in relation to a post-grant contravention, the person who is the landlord under the agreement at the time of the contravention.

It is not perhaps surprising that it has been widely suggested that landlords will aim to ‘cover their own backs’ by opting for tenants with ‘British-sounding names over more exotic ones’³³ Even the Church of England has warned that the Act is ‘highly divisive’

³² Ibid

³³ Caton [2014] ‘Will the new immigration bill create a ‘border on every street’ www.greatbritishcommunity.org

and is likely to create “...a border in every street”³⁴ mainly due to private landlords failing to understand the complexities of the legislation. Hence, in order to at least attempt to alleviate the concerns as to the practicalities of implementation, two Orders also came into force on December 1 2014; The Immigration (Residential Accommodation)(Prescribed Cases) Order 2014 (SI 2014/2873) and the Immigration (Residential Accommodation)(Prescribed Requirements and Codes of Practice) Order 2014 (2014/2874). The former of these sets out additional circumstances as to when a residential tenancy agreement will be treated as being formed, and the latter, more importantly, seeks to inform the landlord as to the ‘prescribed requirements’ for the identity checks.

The ‘Prescribed Requirements’

The onerous duty on the landlord then, is to initially [up to 28 days before the start of the tenancy] check the status of their tenant, but then to continue to track their ongoing status. The Code explains that if ‘follow-up checks’ reveal that the occupier no longer has the ‘right to rent’, then the Landlord must not simply evict, but rather ‘make a report to the Home Office’ giving full details and copies of all documentation retained by the Landlord³⁵.

As such the Order and accompanying Code of Practice prescribes a list of documents which must be requested, verified, retained, and copied or recorded to ensure full statutory compliance. The Order sets down three ways for landlords or their agents to ensure compliance:

1. *obtain **one** document from a preferred list of 8 confirming that the occupier or prospective occupier has a right to rent, including a British passport , EEA or Swiss passport or national identity card, permanent residence document issued by the Home Office to an EEA or Swiss national, unexpired biometric immigration document issued by the Home Office indicating that the person*

³⁴ Ibid

³⁵ Ibid at Paragraph 5.4

named has indefinite leave to remain in the United Kingdom/no time limit on their stay in the United Kingdom or certificate of registration or naturalisation as a British citizen etc.

2. obtain **two** documents from a list of 10 lesser-weighted documents including government department letters, birth/adoption certificate, current driving licence, current firearm certificate or similar document

3. obtain a **Positive Right to Rent Notice** for the occupier or prospective occupier from the Landlord Checking Service. This applies where the occupier or prospective occupier informs the landlord or agent:

- a. *that they have an outstanding application to vary their leave to enter or remain in the United Kingdom or have an administrative review or appeal pending against a decision on that application,*
- b. *that they are an asylum seeker or have an appeal pending against a determination made by the Secretary of State in respect of their claim for asylum,*
- c. *that they have made an application for a residence card or derivative residence card within the last 6 months,*
- d. *that they are a person to whom the Secretary of State has granted permission to occupy premises³⁶.*

However, this is only the start of the process. The Landlord must then take steps to verify the documents, ensuring that the documents themselves are genuine, and that the documents refer to the tenant themselves. The Landlord must then ensure that

³⁶ This is set down in full by Sharan [2015] ‘The Immigration Act 2014: Residential Tenancies’
www.immigrationadvicelawyers.co.uk

clear, legible, unalterable copies are kept, the date the copies were taken must also be recorded and these copies securely retained for at least one year after the tenancy ends. The Landlord must also carry out the same procedure for any additional occupants of the property at the time the residential tenancy begins. The Home Office Code of Practice ‘explains’ all of these procedures in some detail, and with a potential fine of up to £3000, Landlords can not afford to take this lightly.³⁷ The Home Office glibly inform Landlords that carrying out these “...simple documentary checks” will ensure avoidance of liability for the penalty.³⁸ In the second Code of Practice specifically detailing the civil penalty scheme, the Home Office refer to the carrying out of these ‘simple’ checks as being sufficient to ‘establish a statutory excuse’ against liability, helpfully pointing out that landlords can get ‘off the hook’ by appointing an agent who will then “...be the liable party in place of the landlord”³⁹ However, in Paragraph 1.3 the Home Office make it clear that although this is a ‘statutory code’ it does not impose “any legal duties on landlords, nor is it an authoritative statement of the law” rather a Code which will, if ignored, be used as evidence in any proceedings.⁴⁰

It is perhaps unsurprising that the opposition from Landlords and the RLA includes the argument that to say the least “...immigration documents are not often straight forward to interpret”⁴¹ as Mark Harper found to his great personal and professional cost. As Diane Abbott MP has warned, the real effect of this onerous burden on landlords is likely to be that “...landlords will not want to take the chance of letting to someone who ‘might be’ an illegal immigrant” regardless of the Code’s suggestions on how to avoid such discrimination.⁴² The Home Affairs Select Committee, in their report into the work of the UK Borders Agency, also drew attention to the risk that the ‘right to check’ provisions might well “...produce a bonanza for unscrupulous landlords who already operate outside the law, driving more people into the twilight world of beds-in-sheds and overcrowded houses...”⁴³. As such, it was however, decided that a pilot scheme

³⁷ Ibid

³⁸ Home Office [2014] ‘Code of Practice for Landlords – avoiding unlawful discrimination when conducting ‘right to rent’ checks in the private residential sector’ www.gov.uk

³⁹ Home Office [2014] ‘Code of Practice on illegal immigrants and private rented accommodation – Civil Penalty Scheme for Landlords and their Agents’ www.gov.uk

⁴⁰ Ibid

⁴¹ Secker, J [2014] ‘Civil Penalty Scheme for private landlords’ Fisher Meredith www.fishermeredith.co.uk

⁴² Abbott, D cited in J [2014] ‘The UKIP-ification of law’ www.nearlylegal.co.uk

⁴³ HASC [2014] ‘The Work of the UK Border Agency (January-March 2013) – Eighth Report of Session 2013-14 paragraph 25

in the West Midlands would begin from December 1 when the legislation came into force before the potential national roll- out of the scheme.

The Pilot

Not least due to the fact that the Bill proved "...highly controversial within the private rental sector"⁴⁴ with concerns raised by organisations such as the RLA, it was agreed that a pilot would run for 6 months from December 1st 2014 within the West Midlands to all properties occupied by tenants under Residential Tenancy Agreements of any 'tenancy' below 7 years, but including sub-lets, lodgers and licencees, granted on or after December 1, in line with the legislative provisions⁴⁵. It was announced by James Brokenshire in September 2014, that the pilot would be launched in Birmingham, Walsall, Sandwell, Dudley and Wolverhampton as part of a 'phased introduction' across the UK.⁴⁶ Brokenshire promised that Landlords would have "all the advice and support they need in advance of the checks going live on 1 December"⁴⁷ also stating confidently that this should not be a problem as "...many responsible landlords already do this [check identity and citizenship] as a matter of routine and most legal renters will have the correct documentation ready to hand"⁴⁸. It is difficult to assess as to whether this was an opinion based on factual evidence, wishful thinking or simply a "...gross sweeping statement"⁴⁹. What is clear however, is that critics such as the West Midlands representative of the National Landlords Association, Mary Latham, suggest that the local pilot scheme will see landlords renting to 'low-risk' tenants or those who's right to live in the UK is 'clear-cut'.⁵⁰

The pilot is due to run until the end of May 2015, at which point an Advisory Panel set up by the Home Office will evaluate the scheme to assess its effectiveness and to analyse as to whether the scheme has managed not to "...exacerbate problems of

⁴⁴ Hyatt, T [2015] 'Residential landlords and obligations under the Immigration Act 2014' Invictus Chambers www.invictuschamberslondon.co.uk

⁴⁵ Ibid

⁴⁶ Brokenshire, J [2014] 'West Midlands to be first landlord 'right to rent' check area' www.gov.uk

⁴⁷ Ibid

⁴⁸ Ibid

⁴⁹ Smith, K [2012] 'Fairness, Class and Belonging in Contemporary England' Palgrave Macmillan

⁵⁰ Latham, M [2014] cited in BBC News 'Right to Rent checks start in West Midlands' BBC News, 2 December 2014 www.bbc.co.uk

discrimination and homelessness”⁵¹. The pressure group MAX [Movement against Xenophobia] explains that it is working closely with other groups such as Shelter, the National Union of Students, the Chartered Institute of Housing, and the Birmingham branch of the Coventry Law Centre to monitor the scheme by way of inviting responses to a survey from both landlords and tenants subject to the pilot.⁵² The Guild of Residential Landlords recently published some rather telling early feedback from the pilot scheme. They have taken evidence collated by the Joint Council for the Welfare of Immigrants [JCWI] which suggests that landlords are “...turning away tenants they feel will not easily pass an identity check” and also charging “extra fees of up to £100” to carry out the necessary checks.⁵³ They cite a JCWI spokesperson as stating that “...landlords have told us that they are unlikely to let someone view a home who might have problems with their documentation...” and that this has a major impact even on British nationals who do not have a passport or other relevant documentation. The spokesperson pointed to a case where an American had reported that her British husband was invited to view a property where only days earlier, she had been told that it was unavailable.⁵⁴ The issue of possible discrimination has also been highlighted by an industry watchdog, Property Industry Eye, who also report on the JCWI findings, quoting Saira Grant, the policy director as stating that the impact on migrants and those without passports is that discrimination is being ‘encouraged’⁵⁵

What is perhaps rather telling, are some of the blog responses which clearly demonstrate the viewpoints of a number [admittedly small] of landlords: ⁵⁶

Comments

1. *ray comer*

February 17, 2015 at 8:59 am

One has to ask why a legitimate tenant would have any problems identifying themselves? passport, id card, FO documentation – any legitimate tenant should have these to hand.

⁵¹ MAX [2014] ‘Right to Rent checks – Our Survey’ www.noxenophobia.org

⁵² Ibid

⁵³ Guildy [2015] ‘Right to Rent Landlords Hike Fees in Pilot Areas’ Guild of Residential Landlords, www.landlordsguild.com

⁵⁴ Ibid

⁵⁵ Renshaw, R [2015] ‘Immigration ‘right to rent’ trials showing discrimination’ www.propertyindustryeye.com

⁵⁶ The blog responses are taken from the responses to the article by Renshaw.

Typical of Shelter to look at it from entirely the wrong angle

[Log in to Reply](#)

Dislike (0)Like (12)

2. *seenitall*

February 17, 2015 at 9:05 am

So if we have two tenants one with a EU passport and one with a non Eu passport but with a 12 month visa and 9 months left to run which are we going to go with? Clearly the EU passport holder as its less admin work and risk for us as an agency. Why should we have to monitor and keep ongoing checks on the visa status of a tenant, why should we bear the risk of a £3000 per tenant – much better to just let to EU passport holders or those with an indefinite permission to stay.

[Log in to Reply](#)

Dislike (0)Like (11)

3. *march*

February 17, 2015 at 9:11 am

Once again Shelter (and others) are directing their fire at the wrong target. Landlords and agents didn't ASK for yet another layer of bureaucracy which is risky (£3000 fines and harassment by disappointed applicants) time-consuming and expensive to administer. Why don't these goody 2-shoes organisations take this entire subject up with the government and leave us bl**dy well alone ??

[Log in to Reply](#)

Dislike (0)Like (7)

4. *seenitall*

February 17, 2015 at 9:23 am

We are coming down to the view that unless a tenant has a EU passport or indefinite right to stay we wont let to them. its too much hassle and risk. It business not personal.

[Log in to Reply](#)

Dislike (0)Like (5)

February 17, 2015 at 10:02 am

I do not see what the big issue is here. I already take photo copies of original passport visa etc and we use a professional referencing company to carryout a full profile check. The only additional work is clicking on to the GOV link to their web site to input data on passport & visa. This gives an immediate response and you diarise expiry dates....no big deal in time or cost.

However I do feel the GOV is targeting the wrong market....illegal immigrants already come in under the radar and occupy properties you are unlikely to find in the High Street Agents shopfront. Illegal immigration and properties are in the same supply chain with the same people running them.

Overall, though evidence gathered as yet is limited as to the impact of the pilot, the fears propounded by Robinson and Ogilvie of Liberty that the 'right to check' provisions are "...offensive, unworkable, and will lead to discrimination in practice"⁵⁷ seem to be thus far, borne out.

Discrimination

The Code of Practice which aims to assist landlords in avoiding 'unlawful discrimination' suggests that though these checks must be carried out, "they must also ensure that they act in accordance with their obligations under equality legislation"⁵⁸. This 16 page document informs the landlord that it is "...unlawful to discriminate in letting practices on the basis of race, which includes colour, nationality and national or ethnic origins"⁵⁹. This of course, does not seem to sit well with the provisions of s20-37. According to Robinson and Ogilvie, this is precisely what Landlords are being encouraged to do. However, the Code goes on. It explains to landlords that it is only unlawful discrimination if the landlord refuses to let to, or carry out checks on a person who they **believe** is not a British citizen – this, they say, constitutes direct

⁵⁷ Robinson, R and Ogilvie, O [2014] "Liberty's Committee Stage Briefing on Part 3, Chapter 1 (residential tenancies) of the Immigration Bill in the House of Lords" Liberty80, www.liberty-human-rights.org.uk

⁵⁸ Home Office [2014] 'Code of Practice for Landlords – avoiding unlawful discrimination when conducting 'right to rent' checks in the private residential sector' www.gov.uk

⁵⁹ Ibid

discrimination. It helpfully reminds landlords that “the majority of people from ethnic minorities in the UK **are** [my emphasis] British citizens”⁶⁰, and even those who are not, the majority have the right to be here as do the ‘vast majority’ of non-EEA nationals. It warns landlords that it should not be “assumed” that just because a person is from an ethnic minority or that they “speak with a particular accent” they have no right to be in the UK.

So, what is the answer? The answer, according to the following paragraph of the Code, is that Landlords should simply obtain their “statutory excuse” by checking documents both initially and ongoing “...for **all** persons who will use the premises they let as their only or main home”⁶¹. This, says the Home Office, will suitably and effectively “protect them from liability for a civil penalty if the person is an illegal immigrant...” whilst at the same time “...demonstrating consistent, transparent and non-discriminatory letting practices”⁶². The Code then goes on over the next 10 pages to set down the law on Discrimination under the Equality Act 2010, explaining both direct and indirect discrimination. Hence, it suggests, if the checks are carried out on all prospective tenants then there can be no claim of direct discrimination. However, one point is missed here. The Home Office explains that ‘indirect discrimination’ occurs when “...a provision, criterion or practice, although applied equally, would put persons of a particular racial group at a particular disadvantage compared with other persons...unless the provision, criterion or practice is objectively justifiable (appropriate and necessary)”⁶³. Landlords should surely be made aware then, that the ‘checks for all’ advice may still constitute indirect discrimination in exactly the same way that the requirement to wear uniform which did not include a turban in the celebrated case of *Mandla v Dowell-Lee* [1983]⁶⁴ was held by the House of Lords to indirectly discriminate against the schoolboy Gurinder Singh Mandla. Though the provision *prima facie* was aimed at **all** schoolboys, boys of Sikh ethnicity were particularly disadvantaged. It is not too taxing to see how the Home Office advice of ‘checks for all’ could constitute indirect discrimination in much the same manner. It will of course need a test case to rule on firstly whether the checks do ‘particularly

⁶⁰ Ibid

⁶¹ Ibid

⁶² Ibid

⁶³ Ibid, cited at page 7

⁶⁴ As cited in Bindman, G [2008] ‘The Right to Wear a Turban’ New Law Journal, 24 April 2008 Issue 7318 www.newlawjournal.co.uk

disadvantage' certain 'groups' and secondly whether the practice can be justified by the Home Office. Certainly Baroness Lister in her Hansard speech during the Second Reading cited the view of the UN High Commissioners for Refugees who warned the provisions would "...lead to further stigmatisation of, and discrimination against, refugees and asylum seekers".⁶⁵ She further points to the view of the Joint Committee on Human Rights, cautioning that "a disqualification from renting or occupying...on grounds of immigration status will heighten the risk of wider, even if unintentional, racial discrimination in lettings"⁶⁶ Going further the Baroness also points to the possible rise in homelessness for those who have lost their right to remain, but face 'genuine barriers' to leave, suggesting that this could even be tantamount to inhuman and degrading treatment and as such a breach of Article 3 of the ECHR/Human Rights Act⁶⁷.

At Paragraph 8 of their report, Robinson and Ogilvie also argue that "...regular and routine identity checking" will affect the civil liberties of all, but will be "most keenly felt by ethnic minorities or those who appear to be from outside of the EEC by reason of name, skin colour or accent"⁶⁸ This supports the argument that the provisions may well fall foul of the 'provisions rule' of indirect discrimination. The authors also reiterate that just because the Home Office have provided the Code of Practice, "contravention of the Code...will not make a person liable..." and as such residential landlord organisations are "...united in warning that discrimination will take place in practice"⁶⁹ Rather than accurately check the immigration status of prospective tenants, Robinson and Ogilvie point to the fact that many lettings agents have "...acknowledged the likelihood that landlords will attempt to protect against liability by discriminating..."⁷⁰ Caton⁷¹ cites Dr Hywel Francis MP, chair of the Joint Committee on Human Rights, who suggests that "...creating a hostile environment for illegal immigrants...will...lead to breaches of human rights and unjustified discrimination in practice" and points out

⁶⁵ Baroness Lister of Burtsett [2014] 2Immigration Bill – Second Reading", Hansard, House of Lords debate 10 February 2014.

⁶⁶ Ibid

⁶⁷ Ibid

⁶⁸ Robinson, R and Ogilvie, O [2014] "Liberty's Committee Stage Briefing on Part 3, Chapter 1 (residential tenancies) of the Immigration Bill in the House of Lords" Liberty80, www.liberty-human-rights.org.uk

⁶⁹ Ibid

⁷⁰ Ibid

⁷¹ Caton [2014] 'Will the new immigration bill create a 'border on every street'
www.greatbritishcommunity.org

that the Bill had already been pronounced by the JCHR to be “in direct contravention of the Equality Act”⁷².

The conclusions drawn therefore, borne out somewhat by the initial evidence from the pilot, is that there may well be “...outright discrimination against “foreigners” partly through ignorance and partly through an abundance of caution...” resulting in “...misery for landlords and potential tenants alike”.⁷³ It seems entirely possible given the early indications, that the ‘right to check’ provisions proudly announced by Theresa May with the objective of creating a “really hostile environment for illegal migrants”, may well result in a descent into the “stinking gutter of xenophobia”⁷⁴ as suggested by Baroness Lister. From a more pragmatic perspective, as Robinson and Ogilvie suggest, it seems that at best, the provisions are wholly unworkable, especially “...given the chaotic administration and record keeping of the Home Office and the UKBA...” and that the helpline being able to provide landlords with the relevant information necessary to avoid liability is “fanciful”.⁷⁵ It would seem that, as the two authors suggest, the scheme is replete with “myriad complications and difficulties...” and landlords will surely be “bewildered by the complexity of it”⁷⁶. Perhaps more worryingly, the ‘right to check’ provisions require that identity and legal status checks are carried out ‘in-land’ away from the point of border entry. As Robinson and Ogilvie suggest, this seems to be an “unprecedented shift⁷⁷” in policy and practice. It remains to be seen as yet, as to whether the national roll-out will go ahead as relatively unscathed as the Bill went through Parliament. If so, the Act, as O’Callaghan has suggested, may well be used as a weapon and the creation of a ‘hostile environment’ will be a reality.

⁷² Ibid

⁷³ J [2014] ‘The UKIP-ification of law’ Nearly Legal, www.nearlylegal.co.uk

⁷⁴ Baroness Lister of Burtersett [2014] 2Immigration Bill – Second Reading”, Hansard, House of Lords debate 10 February 2014

⁷⁵ Robinson, R and Ogilvie, O [2014] “Liberty’s Committee Stage Briefing on Part 3, Chapter 1 (residential tenancies) of the Immigration Bill in the House of Lords” Liberty80, www.liberty-human-rights.org.uk

⁷⁶ Ibid

⁷⁷ Ibid

BIBLIOGRAPHY

Abbott, D cited in J [2014] '*The UKIP-ification of law*' www.nearlylegal.co.uk

Baroness Lister of Burtersett [2014] '*Immigration Bill – Second Reading*', Hansard, House of Lords debate 10 February 2014.

Bindman, G [2008] '*The Right to Wear a Turban*' New Law Journal, 24 April 2008 Issue 7318 www.newlawjournal.co.uk

Brokenshire, J [2014] '*Immigration Bill becomes law*' Home Office 14 May 2014 www.gov.uk

Brokenshire, J [2014] '*West Midlands to be first landlord 'right to rent' check area*' www.gov.uk

Caton [2014] '*Will the new immigration bill create a 'border on every street*' www.greatbritishcommunity.org

Dixon, M [2000] '*The non-proprietary lease: the rise of the feudal phoenix*' C.L.J. 2000, 59(1) 25-28

Grove-White, R [2014] '*What you need to know about the Immigration Bill*' Migrant Rights Network, www.migrantrights.org.uk

Guildy [2015] '*Right to Rent Landlords Hike Fees in Pilot Areas*' Guild of Residential Landlords, www.landlordsguild.com

HASC [2014] '*The Work of the UK Border Agency (January-March 2013) – Eighth Report of Session 2013-14 paragraph 25*

Home Office [2014] '*Code of Practice on illegal immigrants and private rented accommodation – Civil Penalty Scheme for Landlords and their Agents*' www.gov.uk.

Home Office [2014] '*Code of Practice for Landlords – avoiding unlawful discrimination when conducting 'right to rent' checks in the private residential sector*' www.gov.uk

Hyatt, T [2015] '*Residential landlords and obligations under the Immigration Act 2014*'
Invictus Chambers www.invictuschamberslondon.co.uk

J [2014] '*The UKIP-ification of law*' Nearly Legal, www.nearlylegal.co.uk

Kirkup, J and Winnett, R [2012] "*Theresa May interview: We're going to give illegal migrants a really hostile reception*" The Telegraph, 25 May 2012

Latham, M [2014] cited in BBC News '*Right to Rent checks start in West Midlands*' BBC News, 2 December 2014 www.bbc.co.uk

MAX [2014] '*Right to Rent checks – Our Survey*' www.noxenophobia.org

McCleod, M (2013) "*Theresa May's immigration bill is a valuable tool for racist landlords*",
The Guardian, Tuesday 15 October 2013

O'Callaghan, D [2015] '*Immigration Act 2014; Creating a hostile environment – the Act as a weapon*' www.landmarkchambers.com

Pawlowski, M [2005] '*The Bruton Tenancy – clarity or more confusion?*' Conv. 2005
May/June 262-270

Renshaw, R [2013] '*Immigration Bill's proposals slammed as 'reckless'*' Letting Agent Today,
17 October 2013 www.lettingagenttoday.co.uk

Renshaw, R [2015] '*Immigration 'right to rent' trials showing discrimination*'
www.propertyindustryeye.com

Robinson, R and Ogilvie, O [2014] '*Liberty's Committee Stage Briefing on Part 3, Chapter 1 (residential tenancies) of the Immigration Bill in the House of Lords*' Liberty80, www.liberty-human-rights.org.uk

Secker, J [2014] '*Civil Penalty Scheme for private landlords*' Fisher Meredith
www.fishermeredith.co.uk

Sharan [2015] '*The Immigration Act 2014: Residential Tenancies*'
www.immigrationadvicelawyers.co.uk

Smith, K [2012] '*Fairness, Class and Belonging in Contemporary England*' Palgrave
Macmillan

